No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BARBARA ALLEN BABCOCK,
Acting Assistant Attorney General,

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General,

LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Cases—Continued

Statutes and regulations:

Statutes and Regulations—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense, the Director of the Defense Supply Agency, the Director of the Office of Federal Contract Compliance Programs, and the Secretary of Labor, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in these cases.[1]

---

[1] Nine separate cases were decided in the single opinion of the court of appeals: *Westinghouse Electric Corporation, et al.* v. *Schlesinger, et al.*, Nos. 74-1801, 74-1802, 74-1803, 74-2047, and 74-2048; *United States Steel Corporation* v. *Schlesinger, et al.*, Nos. 75-1268 and 75-1269; *General Motors Corporation* v. *Schlesinger, et al.*, Nos. 75-1270 and 75-1271. Judgments adverse to the federal parties were entered in Nos. 74-1801, 74-2048, 75-1269, and 75-1271. Review is hereby sought in the latter four cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-57a) is reported at 542 F.2d 1190. The opinion of the district court in *Westinghouse Electric Corporation, et al.* v. *Schlesinger, et al.* (App. B, *infra*, pp. 58a-69a) is reported at 392 F. Supp. 1246; the opinion of the district court in the consolidated cases of *United States Steel Corporation* v. *Schlesinger, et al.*, and *General Motors Corporation* v. *Schlesinger, et al.* (App. C, *infra*, pp. 70a-73a) is unreported.

JURISDICTION

The judgments of the court of appeals (App. D, *infra*, pp. 74a-80a) were entered on September 30, 1976. On December 22, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 28, 1977, and on January 21, 1977, he further extended the time for filing a petition to and including February 27, 1977 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government, pursuant to regulations, may disclose information that is exempt from mandatory disclosure under the Freedom of Information Act and that is of the character described in 18 U.S.C. 1905.

2. Whether judicial review of an agency's decision to disclose information pursuant to the regulations is limited to review of the administrative record for abuse of discretion.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, as well as 18 U.S.C. 1905 and the pertinent regulations of the Office of Federal Contract Compliance Programs, 41 C.F.R. Part 60-40, are set forth at App. E, *infra*, pp. 81a-87a.

STATEMENT

1. Respondents, Westinghouse Electric Corporation (and its subsidiary, Fraser & Johnston Company), United States Steel Corporation, and General Motors Corporation, are government contractors.[2] As a condition of doing business with the government, they are required by executive order and regulations promulgated thereunder by the Secretary of Labor to employ and treat all employees without regard to race, color, religion, sex, or national origin, and to take affirmative action to eliminate discriminatory employment practices. Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303 (see 3 C.F.R. 169, 171-172); 41 C.F.R. 60-1.4. To aid in monitoring compliance with these requirements, every contractor and subcontractor with fifty or more employees and a contract valued at $50,000 or more is required by regulation to prepare and file an annual Employer Information Report, known as an EEO-1 report. 41 C.F.R. 60-1.7(a). These reports contain data on the number of women and members of minority groups employed by the contractor. In addition, the

[2] The statement of facts, which are not in dispute, is based upon the separate joint appendices in the court of appeals.

contractor or subcontractor must prepare and make available for agency inspection an Affirmative Action Program ("AAP"), in which the contractor is required to provide detailed information on the past and projected employment of women and minority group members. 41 C.F.R. 60-1.40, 60-2.1, 60-60.2(a).[3]

The Secretary of Labor has delegated administrative responsibility under these regulations to the Director of the Office of Federal Contract Compliance Programs ("OFCCP"). 41 C.F.R. 60-1.2.[4] In turn, the Director has designated various federal agencies as "compliance agencies" and has delegated to each of them primary responsibility for assuring adherence to the equal employment opportunity program by contractors within certain geographical areas or industrial classifications. See 41 C.F.R. 60-1.6. See also OFCCP Compliance Manual, § 2-202.

The regulations promulgated by the Secretary of Labor contain rules providing for public access to information from records of the OFCCP or its various

---

[3] AAP's must contain data pertinent to two general categories: (1) a "utilization analysis," which describes the occupational levels of minority personnel employed by the company, and (2) the "establishment of goals and time tables" by which opportunities for minority group members can be improved within the company. 41 C.F.R. 60-2.10. Failure of a contractor to develop an AAP, or to make a good faith effort to adhere to the policy of equal opportunity employment, can result in the cancellation, termination or suspension of the contract. 41 C.F.R. 60-1.24, 60-2.2.

[4] The OFCCP is the successor agency to the President's Committee on Equal Employment Opportunity. In Executive Order 11246, the Committee was abolished and its functions transferred to the Secretary of Labor. 30 Fed. Reg. 12319. The Secretary, in turn, established the OFCCP to carry out his responsibilities. 30 Fed. Reg. 13441.

compliance agencies. 41 C.F.R. Part 60-40 (App. E, *infra,* pp. 83a-87a). The regulations are designed explicitly to "implement * * * the Freedom of Information Act" and to give effect to "the policy of the OFCC[P] to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 C.F.R. 60-40.1. As a general guideline for the implementation of this policy, the regulations provide that "[u]pon the request of any person * * * records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure [under the Freedom of Information Act], if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." 41 C.F.R. 60-40.2(a).

Under this general guideline, the Secretary of Labor has determined that, upon request, "* * * [EEO-1 reports] which [are] submitted by contractors to the OFCC[P] [or] a compliance agency * * * shall be disclosed." 41 C.F.R. 60-40.4. The Secretary also has determined that affirmative action plans generally "must be disclosed." 41 C.F.R. 60-40.2(b)(1). But the regulations contain exceptions for two specified portions of AAP's, which "should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of [OFCCP's or the compliance agencies'] functions." 41 C.F.R. 60-40.3(a). The por-

tions of AAP's that are subject to withholding include "goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts and changes in his personnel requirements and he has not made this information available to the public" (41 C.F.R. 60-40.3(a)(1)) and "information on staffing patterns and pay scales but only to the extent that [its] release would [*inter alia*] injure the business or financial position of the contractor * * *" (41 C.F.R. 60-40.3(a)(2)). These portions of AAP's are to be withheld as provided in the regulations, but "only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld." 41 C.F.R. 60-40.3 (a)(1).

2. The compliance agency for all of the respondents here is the Defense Supply Agency (DSA), a component of the Department of Defense. In 1973, DSA received requests from various members of the public for the disclosure of certain EEO-1's and AAP's submitted to the agency by respondents.[5] The proceedings

[5] A request for the 1972 EEO-1 for respondent Westinghouse Electric's facility in East Pittsburgh, Pennsylvania, was filed by Concerned Workers (a public interest group); a request for the 1972 AAP of respondent Fraser & Johnston Company, a wholly-owned subsidiary of Westinghouse Electric, was submitted by the Legal Aid Society of Alameda County. A disclosure request for various AAP's and EEO-1's of respondent General Motors was submitted by Reuben Robertson, III, and separate disclosure requests for the EEO-1's and AAP's filed by respondent United States Steel were made by the Commission for Human Relations of Gary, Indiana, and by James Davis, Chairman, Civil Rights Commission, Local Union 1462, United Steelworkers Union, on behalf of the Youngstown Urban League.

with respect to each request followed the same general pattern. Each respondent was advised that a request for disclosure of its AAP's and EEO-1's had been received and was given the opportunity to demonstrate, prior to release, that any portion of the documents should not be disclosed. DSA requested that respondents submit detailed reasons to support any claim that the information should be withheld.

Respondents submitted objections to disclosure, each claiming essentially that the documents should be withheld because they contained confidential corporate proprietary information, the release of which would adversely affect their business interests. After reviewing respondents' submissions, DSA concluded that disclosure of most of the information requested was warranted under OFCCP's disclosure regulations, 41 C.F.R. Part 60-40. Specifically, DSA determined that disclosure of the EEO-1 reports was required by 41 C.F.R. 60-40.4 and that disclosure of substantial portions of the AAP's was required by 41 C.F.R. 60-40.2 (b)(1). DSA concluded, however, that certain portions of the AAP's should be withheld from disclosure under 41 C.F.R. 60-40.3(a).[6]

Before any information was released, respondents were given further opportunity to convince the agency

[6] In general, the proposed deletions concerned wage data, salary rates, promotion analyses that would identify individual employees, projections of hiring or lay-off rates that would indicate substantial changes in business patterns, and the reasons for terminating the employment of specific individuals.

to withhold disclosure. After considering additional submissions and, in some cases, meeting directly with representatives of respondents, DSA made its final determination to disclose.

3. Respondents thereupon filed separate suits in the United States District Court for the Eastern District of Virginia, seeking to enjoin the contemplated disclosure. The suits brought by respondents General Motors and United States Steel were consolidated for trial. The suit brought by respondent Westinghouse Electric proceeded independently. The claims of all three respondents were virtually identical: that disclosure was barred, *inter alia,* by exemptions 3 and 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(b)(3) and (4),[7] as well as by 18 U.S.C. 1905,[8] and that release of such documents would constitute an abuse of discretion.[9]

In the *Westinghouse Electric* case, the district

[7] These exemptions provide that the requirement of mandatory disclosure in the FOIA "does not apply to matters that are—* * * (3) specifically exempted from disclosure by statute * * * [or to] (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential * * *." See App. E, *infra,* p. 82a.

[8] 18 U.S.C. 1905 provides that "[w]hoever, being an * * * employee of the United States * * * discloses * * * in any manner or to any extent not authorized by law any information coming to him * * *, which information concerns or relates to the trade secrets, processes, operations [etc.] * * * of any * * * firm * * * shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment." See App. E, *infra,* pp. 82a-83a.

[9] Respondents also claimed that disclosure was barred by 42 U.S.C. 2000e-8(e). Respondents United States Steel and Westinghouse Electric additionally claimed that the documents were protected under exemption 7 of the FOIA.

court permanently enjoined petitioners from releasing specific portions of the AAP's and EEO-1's at issue (App. B, *infra,* p. 66a). Relying upon testimony taken at a *de novo* trial, the district court found that certain specified portions of the documents "contain commercial or financial information which is confidential" (App. B, *infra,* p. 62a) and that "the disclosure of [those portions] of the EEO-1['s] and AAP['s] is prohibited by the exemption contained in 5 U.S.C. 552(b)(4) * * *" (App. B, *infra,* p. 62a). The court also indicated that disclosure of portions of the documents was prohibited by 18 U.S.C. 1905 and that respondents could "invoke this statute to prevent the Government from disclosing information to a third party * * *" (App. B, *infra,* p. 64a).[10]

A few months after the decision of the district court in *Westinghouse Electric,* judgment was entered in the consolidated *General Motors* and *United States Steel* cases. The district court in those cases adopted "in toto" the opinion of the court in *Westinghouse Electric* and, after viewing the documents in issue, held that certain portions of them could not be disclosed (App. C, *infra,* pp. 70a-73a).

On consolidated appeals by all parties, the court of appeals affirmed (App. A, *infra,* p. 57a). The court of appeals stated that "disclosure of * * * exempt information is ordinarily discretionary with the agency [b]ut the exercise of this discretionary power is subject to the restraints imposed by other 'statutes * * *' and to any clear declarations of a legislative policy against

[10] The court rejected Westinghouse Electric's claim that disclosure of all parts of the documents was prohibited by exemption 7 (App. B, *infra,* p. 65a).

disclosure as reflected in an exemption of the [Freedom of Information] Act * * *'' (App. A, *infra,* p. 12a). The court held that under this general principle respondents were entitled to an injunction barring any disclosure that would violate 18 U.S.C. 1905 (App. A, *infra,* p. 41a).[11] In the alternative, the court of appeals held that exemption 4 provided the supplier of confidential commercial or financial information with an absolute right to have such information withheld from the public, and that ''the FOIA itself * * * confers on a supplier of *private* information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within Exemption 4'' (App. A, *infra,* pp. 41a-42a; emphasis in original).[12] The court also ruled that respondents were entitled to a trial *de novo* in the district court on the question whether the information in question fell within either 18 U.S.C. 1905 or exemption 4 (App. A, *infra,* pp. 53a-54a; see *id. at* 50a-51a).[13]

On the merits, the court of appeals, without discussing the OFCCP regulations that authorized disclosure,

[11] The court was of the view that 18 U.S.C. 1905 was comprehended by exemption 3 of the FOIA, and thus that information within its coverage was both exempt from mandatory disclosure under the FOIA and nondisclosable (App. A, *infra,* pp. 14a, 26a).

[12] The court stated that the standard of confidentiality of exemption 4 and Section 1905 were the ''same'' or ''co-extensive'' (App. A, *infra,* pp. 27a, 36a). The standard of confidentiality adopted by the court was whether disclosure was likely to cause respondents substantial competitive injury (App. A, *infra,* p. 27a).

[13] The court rejected the argument that respondents' judicial remedy was limited to the review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, but the court concluded that even if review were available only under the APA, the procedure followed by the district courts here ''was free from error'' (App. A, *infra,* p. 38a).

held that the findings of the district court that portions of the EEO-1 reports and AAP's in question were within exemption 4 and 18 U.S.C. 1905 were not clearly erroneous (App. A, *infra,* p. 57a). The court sustained the injunctions against disclosure of those portions of the reports (App. A, *infra,* p. 57a).[14]

REASONS FOR GRANTING THE PETITION

These cases are representative of a steadily increasing number of so-called ''reverse FOIA'' suits by private parties seeking to enjoin the federal government from complying with FOIA requests.[15] Such cases raise important questions concerning the purpose of the Freedom of Information Act, its use by private parties to obtain judicial relief against the disclosure of information, and the role of the executive branch in discharging the legislative directive, affirmatively expressed in the Act, to permit the ''fullest responsible disclosure.'' The court of appeals below, by disregarding, and thereby implicitly rejecting, regulations authorizing the disclosure of exempt materials, seriously misconstrued the language and purpose of the Freedom of Information Act. The court's holding that the executive branch lacks any power to disclose exemption 4 materials conflicts with *Charles River Park ''A,''*

[14] The court of appeals, however, rejected respondents' contentions that disclosure of their AAP's and EEO-1's, in their entirety, was prohibited by 42 U.S.C. 2000e-8(e) (App. A, *infra,* pp. 16a-17a), or that the documents were exempt from disclosure under exemption 7 of the FOIA (App. A, *infra,* pp. 15a-16a, n. 20).

[15] During 1976, at least 78 reverse FOIA suits were brought against the government.

Inc. v. *Department of Housing and Urban Development,* 519 F. 2d 935 (C.A.D.C.), and *Pennzoil Co.* v. *Federal Power Commission,* 534 F.2d 627 (C.A. 5), both of which recognized the existence of discretion to disclose. Furthermore, in holding that the district courts may appropriately conduct trials *de novo* to review an agency's determination to disclose, the court of appeals erroneously departed from the settled rule, often confirmed by this Court, that review of agency action under the Administrative Procedure Act is to be based upon the administrative record.

1. These cases originated with determinations by the Director of the Defense Supply Agency to comply with requests, made under the Freedom of Information Act, for disclosure of certain equal employment opportunity reports and affirmative action plans submitted to it by respondents. Those determinations were made pursuant to regulations specifically requiring disclosure, in compliance with such requests, of EEO-1 reports and, upon a finding of nonconfidentiality,[16] of AAP's as well. 41 C.F.R. 60-40.1 *et seq.* If, as we submit, those regulations are valid, the courts below would have been required to affirm the decision to disclose respondents' EEO-1 reports, and their review of the decision to disclose respondents' AAP's would have been limited to a determination whether those materials were exempt from mandatory disclosure under the

[16] In the interest of brevity, we use the expression "finding of nonconfidentiality" as a shorthand summarization of the determinations with regard to the public interest, competitive injury, confidentiality, etc., that must be made in connection with a decision to disclose AAP's. See pp. 5-6, *supra*.

FOIA and, if so, of the correctness of the agency's finding of nonconfidentiality.

The regulations authorizing disclosure of the materials at issue here are valid. The court of appeals did not give explicit consideration to those regulations, but its holding that the government may not disclose information within exemption 4 of the Freedom of Information Act constitutes an implicit rejection of them."

The court's holding in this regard reflects a misunderstanding of the FOIA. The FOIA is a broadly conceived statute whose "basic policy" and "dominant objective" is "disclosure, not secrecy." *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361. When Congress enacted the Act, it was "plac[ing] emphasis on the fullest responsible disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Thus the exemptions under that Act only permit, they do not require, the government to refuse disclosure of information. *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra,* 519 F. 2d at 941; *Pennzoil Co.* v. *Federal Power Commission, supra,* 534 F. 2d at 629-631. The approach taken by the court below therefore is inconsistent with that taken in similar reverse FOIA cases by the courts in *Charles River Park* and *Pennzoil.*[18]

[17] The court of appeals discussed a Department of Labor regulation, 29 C.F.R. 70.21(a), which prohibits any employee of the Department from disclosing certain records "in any manner or to any extent not authorized by law" (App. A, *infra,* pp. 24a-25a). But disclosure by the OFCCP of the documents at issue here was made pursuant to the authority granted by 41 C.F.R. Part 60-40. The court of appeals' reliance upon 29 C.F.R. 70.21(a) as a ground for enjoining disclosure therefore was misplaced.

[18] It is unclear, however, whether the decision below conflicts with

Furthermore, nothing in the FOIA forbids disclosure. The exemptions, while an important component of the Act, merely describe "the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 80. Disclosure of exempt material is left to the discretion of the officials administering the Act:

> Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive.* They merely mark the outer limits of information that *may* be withheld where the agency * * * determin[es] * * * that the information *should be* withheld. [S. Rep. No. 93-854, 93d Cong., 2d Sess. 6 (1974); emphasis in original.]

Congress understood and intended that discretion to disclose exempt materials could be exercised pursuant to regulations such as those promulgated by the Secretary of Labor authorizing disclosure here. In considering the 1974 amendments to the Act, Congress expressed approval of agency regulations that provide for the discretionary disclosure of exempt information, including commercial or financial information within

Charles River Park and *Pennzoil* in final result. The courts in those cases held that disclosure decisions could be reviewed for abuse of discretion, and the court in *Charles River Park* indicated that, at least in most circumstances, disclosure of material of the kind described in 18 U.S.C. 1905 would be an abuse of discretion. 519 F. 2d at 542, 543 n. 10. However, there is no suggestion that the court in *Pennzoil* would have barred disclosure here.

exemption 4. See S. Rep. No. 93-854, *supra,* at 6.[19] The Senate Committee stated that "[t]his approach was clearly intended by Congress in passing the FOIA". *Ibid.* See also H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 4 (1974); H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 7, 13-17 (1972). And see *General Services Administration* v. *Benson,* 415 F. 2d 878 (C.A. 9). Cf. *Federal Communications Commission* v. *Schreiber,* 381 U.S. 279; *Utah Fuel Co.* v. *National Bituminous Coal Commission,* 306 U.S. 56. But see *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra.*

The controlling regulations here implement Congress' intention under the FOIA to afford "the fullest responsible disclosure." Under the regulations, disclosure generally is predicated upon a determination that it would "further[] the public interest and * * * not impede any of the functions of the OFCC[P] or the Compliance Agencies * * *." 41 C.F.R. 60-40.2(a). But the regulations also give recognition to the competitive interests of government contractors by requiring the agency to determine whether "release would injure the business or financial position of the contractor * * *." 41 C.F.R. 60-40.3(a)(2); see generally 41 C.F.R. 60-40.3(a). These regulations are reasonable and should have been sustained by the court of appeals.

[19] The committee report commented favorably upon 43 C.F.R. 2.2 (Department of Interior), 45 C.F.R. 5.70 (Department of Health, Education, and Welfare), 24 C.F.R. 15.21 (Department of Housing and Urban Development), 49 C.F.R. 7.51 (Department of Transportation), all of which provide for the disclosure of exempt information. See also, *e.g.,* 28 C.F.R. 16.1(a) (Department of Justice); 10 C.F.R. 9.10(c) (Nuclear Regulatory Commission); 40 C.F.R. 2.101 (Environmental Protection Agency).

Insofar as the decisions to disclose respondents' EEO-1 reports and AAP's were authorized by the regulations, they also should have been sustained.

The court of appeals nevertheless held that disclosure was barred by 18 U.S.C. 1905 (App. A, *infra,* p. 41a). That criminal statute forbids disclosure by government officials of certain documents "in any manner or to any extent not authorized by law * * *" (see App. E, *infra,* pp. 82a-83a).[20] But, unless the agency erred in its finding of nonconfidentiality with regard to the AAP's, disclosure here was "authorized" by the Department of Labor regulations. Since validly promulgated regulations have the force of law (see *Public Utilities Commission of California* v. *United States,* 355 U.S. 534, 542-543; cf. *Service* v. *Dulles,* 354 U.S. 363), they satisfy the authorization requirement of 18 U.S.C. 1905. Cf. *Smith* v. *United States,* 305 F. 2d 197, 201-202 (C.A. 9); *Laughlin* v. *United States,* 474 F. 2d 444, 453, n. 12 (C.A. D.C.), certiorari denied, 412 U.S. 941.[21]

[20] The disclosure of information that is not exempt from mandatory disclosure under the FOIA is "authorized" by the FOIA. The court of appeals here held, however, that 18 U.S.C. 1905 is an exemption 3 statute (see note 11, *supra*). See *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255. But see H.R. Rep. No. 94-1178, 94th Cong., 2d Sess. 14 (1976); *National Parks and Conservation Association* v. *Kleppe,* No. 76-1044, decided November 15, 1976 (C.A.D.C.) (slip op. 26-28). As we argue immediately below, whether or not the materials here are exempt from mandatory disclosure, disclosure of the information is "authorized" by 41 C.F.R. Part 60-40. Accordingly, the question whether 18 U.S.C. 1905 is an exemption 3 statute need not be reached in this case.

[21] The term "authorized by law" in 18 U.S.C. 1905 and its predecessor statutes (see 15 U.S.C. (1940 ed.) 176b; 19 U.S.C. (1940 ed.) 1335; 18 U.S.C. (1940 ed.) 216; R.S. 3167, 28 Stat. 557; 13 Stat. 238) has been broadly construed. See, *e.g., Blair* v. *Oesterlein Company,* 275 U.S. 220, 227; *United States* v. *Dickey,* 268 U.S. 378; *Exchange National Bank* v. *Abramson,* 295 F. Supp. 87 (D. Minn.);

Thus even if the materials at issue otherwise are of the type described in 18 U.S.C. 1905, their disclosure is not prohibited by that statute if it is permitted by regulation.

2. Judicial review of adverse agency action taken pursuant to a statutory or a regulatory standard normally is governed by the APA. See, *e.g., Dunlop* v. *Bachowski,* 421 U.S. 560; *Camp* v. *Pitts,* 411 U.S. 138; *Citiens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402.[22]

But the scope of review provided under the APA for cases such as this is narrow. Indeed, once it is determined that the regulations authorizing disclosure are valid, the agency's determination to disclose EEO-1 reports would be essentially unreviewable: the regulations affirmatively require disclosure of all EEO-1 reports upon request, and a reviewing court could do no more than ascertain whether the materials to be dis-

cf. *Consumers Union* v. *Cost of Living Council,* 491 F. 2d 1396 (T.E.C.A.), certiorari denied *sub nom. Business Roundtable* v. *Consumers Union,* 416 U.S. 984. While the early origins of the statute have obscured its principal purpose, it was most likely designed to prevent government officials from taking advantage of their official position to sell or otherwise make public confidential business data. We do not believe it was intended to operate to inhibit an agency from disclosing such information in connection with valid program or policy objectives. See 41 Op. Atty. Gen. 166, 169 (1952) ("authorized by law" includes "authorized in a general way by law").

[22] The exceptions to judicial review (see 5 U.S.C. 701) do not appear to be applicable here. In the court of appeals, the government argued that respondents' suits were barred by sovereign immunity. But Congress since has amended the APA to provide that its judicial review provisions waive sovereign immunity in cases seeking declaratory or injunctive relief. Pub. L. 94-574, 90 Stat. 2721.

closed were in fact such reports. The scope of review of a decision to disclose AAP's would be only slightly broader: the court would determine whether the agency's conclusion that the materials were disclosable under the regulatory standard was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

As a matter of course, such review would be on the basis of the administrative record. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts, supra,* 411 U.S. at 142. See also *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 415-416.

Respondents were notified of the FOIA requests for the documents they had furnished in connection with their government contracts, they were informed of the exact documents subject to the request, and they were afforded a full opportunity to submit materials in support of their claim that the documents should not be disclosed. See pp. 6-8, *supra.* The record in these cases thus provided an adequate basis upon which to undertake an assessment of the agency's determinations to disclose. Accordingly, the court of appeals plainly erred in approving the district court's *de novo* review of those determinations.[23]

---

[23] The court of appeals approved *de novo* review on the theory that respondents' suits were based upon implied causes of action under exemption 4 and 18 U.S.C. 1905. That theory fails for two separate reasons. If, as we have argued, the disclosure regulations here are valid, *a fortiori* respondents had no residual right to nondisclosure under either exemption 4 or 18 U.S.C. 1905; in that event respondents' rights to nondisclosure are measured solely by the disclosure regulations, and review of a determination to disclose is available only under the APA for the reasons discussed above. On the other hand, if the disclosure regulations are invalid, it could only be because respondents have a statutory right to nondisclosure with which those regulations conflict; in that event, a determination to disclose would "adversely affect or aggrieve" respondents within the meaning of 5 U.S.C. 702, for that reason they would be entitled to APA review of the agency determination, and therefore there would be no need to infer an independent right of action under some other statute. Cf. *Cort* v. *Ash,* 422 U.S. 66; *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412; *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BARBARA ALLEN BABCOCK,
Acting Assistant Attorney General.

STEPHEN L. URBANCZYK,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
PAUL BLANKENSTEIN,
Attorneys.

FEBRUARY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1801

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA COUNTY, AND COUNCIL ON ECONOMIC PRIORITIES, INTERVENOR-DEFENDANTS.

No. 74-1802

WESTINGHOUSE ELECTRIC CORPORATION AND ITS SUBSIDIARY, FRASER & JOHNSTON CO., APPELLANTS,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR,

OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR; AND CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA CO., COUNCIL ON ECONOMIC PRIORITIES, APPELLEES.

No. 74-1803

WESTINGHOUSE ELECTRIC CORPORATION AND ITS SUBSIDIARY, FRASER & JOHNSTON CO., APPELLEES,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, DEFENDANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA COUNTY, AND COUNCIL ON ECONOMIC PRIORITIES, APPELLANTS.

No. 74-2047

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

—versus—

JAMES A. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; WALLACE ROBINSON, DIRECTOR DEFENSE

SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, DEFENDANTS.

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA CO., COUNCIL ON ECONOMIC PRIORITIES, INTERVENORS-APPELLANTS.

No. 74-2048

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; WALLACE ROBINSON, DIRECTOR DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA CO., COUNCIL ON ECONOMIC PRIORITIES, DEFENDANT-INTERVENORS.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

No. 75-1268

UNITED STATES STEEL CORPORATION, APPELLANT,

—versus—

JAMES R. SCHLESINGER, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON,

DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, APPELLEES.

No. 75-1269

UNITED STATES STEEL CORPORATION, APPELLEE,

—versus—

JAMES R. SCHLESINGER, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, APPELLANTS.

No. 75-1270

GENERAL MOTORS COPORATION, APPELLANT,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLEES.

No. 75-1271

GENERAL MOTORS CORPORATION, APPELLEE,

—versus—

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLANTS.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued: December 4, 1975. Decided: Sept. 30, 1976

Before RUSSELL and WIDENER, Circuit Judges, and THOMSEN, Senior District Judge.*

RUSSELL, CIRCUIT JUDGE:

The plaintiffs in these three actions are government contractors, seeking injunctive and declaratory relief against the disclosure of certain information filed by them with the Office of Federal Contract Compliance

---

* Sitting by designation.

(OFCC), as required under regulations issued by the Secretary of Labor pursuant to Executive Order 11,246,[1] as amended by Executive Order 11,375.[2] Two of the actions were consolidated for trial in the District Court,[3] and heard by one judge; the third action proceeded independently in the same court and was heard by another judge. In the three actions, however, plaintiffs were granted similar partial protection from disclosure of the information in question.[4] The defendants appeal from the denial of the motions to dismiss and to the grant of any relief herein; the plaintiffs cross-appeal from the denial of protection from disclosure of all the material filed by them under the requirements of the Executive Orders. All three cases involve, so

---

[1] The OFCC was given the authority to "adopt such rules and regulations and issue such orders as * * * necessary and appropriate to achieve the purposes thereof." § 201, Executive Order 11,246.

[2] The text of Executive Order 11,246, as amended by Executive Order 11,375, is set forth in 3 C.F.R. 169-177, (1974).

[3] The action by *General Motors* against the defendants were consolidated and tried with *United States Steel* and any reference to the *United States Steel* case covers the *General Motors* case as well.

[4] *Westinghouse Electric Corporation v. Schlesinger* (E.D. Va. 1974) 392 F. Supp. 1246; *United States Steel Corp. v. Schlesinger* (E.D. Va. 1974) 34 Ad. L. 2d 790.

The two opinions, though, rendered by different judges of the same court, were, for all practical purposes, identical and any reference to "court" hereafter in the opinion is to the opinions and decisions of both judges.

The cases themselves are reviewed in detail in O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 *Bus. Lawyer* 1125, 1139-41 (1975), and *see, also,* discussion in Note, *Developments Under the Freedom of Information Act-1974*, 1975 *Duke L.J.* 416 at 428-9.

far as material, like facts and like legal issues. For this reason, we have consolidated them on appeal and dispose of them in this opinion.

We affirm.

The information, the disclosure of which is the subject of controversy, was supplied under the provisions of an Executive Order, and the regulations issued thereunder, which required a government contractor, such as the plaintiffs, to file, with respect to any plant or facility engaged in performing work under a government contract, an Affirmative Action Program (AAP) and an Equal Employment Opportunity Report (EEO-1). These reports are to be filed with the contracting agency having responsibility for the contract. They are to include extensive information on staffing patterns, pay scales, actual and expected shifts in employment, promotions, seniority and related matters as well as forecasts of future employment, goals, timetables and future employment projections, promotion and utilization of minorities and females. They embrace, also, an analysis of the employer's success in meeting such goals. All the plaintiffs filed such reports. The reports of the plaintiff United States Steel covered its Youngstown, Ohio plant, and the American Bridge Division plant at Gary, Indiana; the reports of the plaintiff General Motors dealt with its plants at Danville, Illinois, and Bedford, Indiana; and the plaintiff Westinghouse filed reports with respect to its plant at East Pittsburgh, Pennsylvania, and its Fraser & Johnston Co. subsidiary plant at San Lorenzo, California. In submitting such reports, all the plaintiffs did so under a claim of confidentiality. The reports,

prepared on Standard Form 100, bore the following governmental promise or guarantee of confidentiality: "[A]ll reports and information obtained from individual reports will be kept confidential as required by Section 709(e) of Title VII."[5]

Third parties made requests of the defendants for disclosure under the Freedom of Information Act (FOIA)[6] of the AAP's and EEO-1's filed with them by the several plaintiffs. The defendants advised the plaintiffs of the requests and of a preliminary determination that the FOIA's and OFCC's disclosure rules required that the requested material, with certain identified deletions, be made available, but that before

[5] In *Legal Aid Society of Alameda County v. Shultz* (N.D. Cal. 1972) 349 F. Supp. 771, 776, the Court held that "administrative promises of confidentiality cannot extend the command of the Freedom of Information Act that only matters 'specifically exempted from disclosure by statute' are protected under § 552 (b)(3)" (Italics in opinion). *Cf., however,* 3A.19 Davis, *Administrative Law Treatise,* pp. 150-1 (1970 Supp.).

In *Robles v. Environmental Protection Agency* (4th Cir. 1973) 484 F.2d 843, 846, we reached the same result as did the Court in the *Shultz Case.*

Since *Shultz,* the defendants have conceded that their promise of confidentiality is unavailing if the matter sought to be discovered is not exempted from disclosure by the terms of § 552 itself. Suppose, however, the material does fall within an exemption and that disclosure under the particular exemption is discretionary with the agency, has the agency by its promise of confidentiality foreclosed itself from the exercise of any discretion to disclose and obligated itself to respect the confidentiality? *See* Davis, *The Information Act: A Preliminary Analysis,* 34 *U.Chi.L.Rev.* 761 at 787-92 (1967); Note, *The Freedom of Information Act: A Seven-Year Assessment, supra,* 74 *Colum. L.Rev.* at 948-50. Since the District Court, however, did not predicate its decision on any such point, we see no occasion to consider this point.

[6] 5 U.S.C. § 552.

the information would be released, the plaintiffs would be afforded an opportunity to present any claim that the information requested was exempt from disclosure under the FOIA and the appropriate administrative regulations. The plaintiffs submitted their objections to the disclosure, claiming that the requested information was not disclosable under the terms of 5 U.S.C. 552(b)(3), (4), (6) and (7), 18 U.S.C. § 1905, and 42 U.S.C. § 2000e-8(e), as well as 41 C.F.R. 60-1.1, *et seq.* of the Department of Labor's own regulations.[7] The defendants responded by advising the plaintiffs that under the FOIA and the regulations issued thereunder, the defendants were obliged, absent judicial intervention, to release the information, subject to certain specified deletions. These actions to enjoin, and for a declaratory judgment that the material was exempt under the FOIA, and disclosure thereof forbidden under applicable statutes and regulations, followed. The District Court, finding federal jurisdiction under § 1331, 28 U.S.C., granted injunctive relief but denied a declaratory judgment. In reaching its conclusion, the court made, among others, this finding of fact:

> "This Court finds from the evidence presented that the AAPs and EEO-1s in question contained confidential commercial or financial information

[7] Exemptions 3 and 4, which are the only exemptions later found to be appropriate, are as follows:

"(b) This section does not apply to matters that are-

* * *

(3) specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."

which would not customarily be released to the public by the corporate plaintiffs, and that such information would be of substantial value to the plaintiff's competitors in performing cost-price analyses of plaintiffs' pricing practices, in monitoring plaintiffs' development of new products and processes, in identifying plaintiffs' customers in their consumption needs, in analyzing plaintiffs' production by product line, and in developing competitive bidding strategies to be used against the plaintiffs; and that disclosure of this information would both impair the Government's ability to obtain necessary information for its administration of the Executive Orders and Title 7 of the Civil Rights Act and would cause substantial harm to the competitive position of the plaintiffs."[8]

The decision of the District Court enjoining disclosure herein rests to a substantial extent on a construction of the FOIA.[9] This statute mandates the release

---

[8] This finding was made in the cases of *United States Steel* and *General Motors v. Schlesinger, supra,* but is similar to the finding of fact made in the *Westinghouse* case.

[9] § 552, 5 U.S.C.

The construction of the Act is complicated not only by the language of the Act itself but by its legislative history as well. Professor Levin, in his article, *In Camera Inspections Under the Freedom of Information Act,* 41 *U. Chi. L. Rev.* 557, ns. 9 and 10 (1974), quotes "Professor Kenneth Culp Davis, the Act's most influential commentator" to the effect that the Act is a "shabby product" and adds that "[i]nterpretation of the Act is complicated by the fact that the House and Senate committee reports on the Act contradict each other in many particulars, and in some instances contradict the statutory language itself."

This ambiguity in the language of the Act and in its legislative history, the author points out, has been productive of much of the litigation under the Act.

by public officials of information in their custody, *subject to certain exemptions specifically enumerated in the Act itself.*[10] If the information sought to be dis-

[10] It has been stated that these exemptions "constitute in the aggregate a substantial withdrawal of the public's right of access to information." Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 *Colum. L. Rev.* 895, 929 (1974).

The reason for including them in the Act was that, "in developing a statute providing greater citizen access to agency information, Congress recognized the necessity for protecting the confidentiality of some agency information and the right of privacy of some individuals who are required to provide agencies with confidential information. To protect these interests Congress exempted nine categories of information from mandatory disclosure." Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,* 70 *Nw. U.L. Rev.* 995 (1976).

In commenting on *National Parks and Conservation Ass'n. v. Morton* (D.C.Cir. 1974) 498 F. 2d 765, which dealt with the exemptions in the Act, the editor in 88 *Harv. L. Rev.* 470 at 474 (1974), said:

> "* * * The Court found that the Act's strong emphasis on public disclosure was counterbalanced, in the nine exemptions, by the public interest in efficient governmental operation and by various interests of private informants in maintaining secrecy."

It is often declared in the decisions construing the exemptions that they are to be "narrowly construed." *Ethyl Corporation v. Environmental Protection Agency* (4th Cir. 1973) 478 F. 2d 47, 49. But, as one writer has prudently observed, the Court, in following this rule of construction, must "recognize that the public's interest in confining the breadth of the exemptions is not equally strong for all nine provisions." *Ibid.,* 41 *U.Chi.L.Rev.* at 564, n. 52. This distinction is important when the request for information relates to "the agency's actions, plans, and policies" rather than when it relates to information that has to do with the "actions, plans, and policies" of private parties. *Ibid.,* 41 *U.Chi.L.Rev.* at 565; Note, *A Review of the Fourth Exemption of the Freedom of Information Act,* 9 *Akron L. R.* 673, 694 (1976).

closed under the Act "fall[s] within one of the Act's exempt categories, * * * the Act 'does not apply' to such documents." *NLRB v. Sears, Roebuck & Co.* (1975) 421 U. S. 132, 147-8; *Charles River Park "A" Inc. v. Department of H. & U.D.* (D.C.Cir. 1975) 519 F. 2d 935, 942.[11] So far as exempt information is concerned, the Act, in the ordinary situation "neither authorizes [n]or prohibits the disclosure of such information," and the disclosure of such exempt information is ordinarily discretionary with the agency. But the exercise of this discretionary power is subject to the restraints imposed by any other "statutes, rules, and regulations"[12] and to any clear declarations of a legislative policy against disclosure as reflected in an exemption of the Act itself,[13] and, when review of an

---

[11] The Act itself, § 552(b), 5 U.S.C., it would appear makes this clear by the following provision:

> "This section [of the FOIA] does not apply to matters that are-" within the definitions of exemptions (1)-(9).

[12] *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Balt.* (4th Cir. 1974) 508 F. 2d 945, 950.

[13] *See,* 70 *Nw.U.L.Rev., supra,* at 1011:

> "If a particular disclosure would be contrary to a policy of the Act, [such as release in a particular case of material within the fourth exemption] a court may properly find that an agency 'abused its discretion' in deciding to release the information-an approach coupling the policy considerations of the FOIA with the remedial provisions of the APA."

The editor in the Note, *Protection from Government Disclosure-The Reverse-FOIA Suit,* 1976 *Duke L.J.* 330 at 340, expresses substantially the same thought:

> "The cases suggest three specific approaches the reverse-FOIA plaintiff might use once he has shown that the information in question is FOIA exempt: he can allege (1) that disclosure of the information in question would violate a statute; (2) that disclosure would be contrary to agency regulations; or (3) that disclosure would constitute an abuse of discretion."

In this connection, we would sharply distinguish between equitable jurisdiction invoked with reference to non-exempt and exempt information. As the Court said in *Freuhauf Corporation v. Internal Revenue Service* (6th Cir. 1975) 522 F. 2d 284, appeal pending, "we do not conceive that the traditional equitable powers of the district court justify it or us in adding a tenth or eleventh exemption to the nine specifically enumerated in the Act * * *." 522 F. 2d at 292. This in effect accords with our decisions in *Wellman Industries, Inc. v. N.L.R.B.* (4th Cir. 1974) 490 F. 2d 427, 429, *cert. denied* 419 U. S. 834 (1974), and *Wellford v. Hardin* (4th Cir. 1971) 444 F. 2d 21, 25. And, as we understand *Renegotiation Board v. Bannercraft Co.* (1974) 415 U. S. 1, discussed at length *infra,* its reference to federal equity jurisdiction in this area is concerned with *exempt* information under the FOIA. This, however, is not the universal view. For a general discussion of the question, *see,* Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 *Colum. L. Rev.* 895, 911-20 (stating the case for general equity jurisdiction for both exempt and non-exempt information); Note, *Developments Under the Freedom of Information Act-1974,* 1975 *Duke L.J.* 416 at 418-27; Note, *Developments Under the Freedom of Information Act-1975,* 1976 *Duke L.J.* 366 at 370-2. While not direct to this point, *Department of the Air Force v. Rose* (1976) — U. S. —, might be considered as pointing in the direction that the discretionary jurisdiction does not cover non-exempt information.

[14] § 706(2)(A), 5 U.S.C.; *Charles River Park "A", Inc. v. Department of H. & U.D., supra,* 519 F. 2d at 940-1; Note *Ibid.,* 70 *Nw.U.L.Rev.* at 995 and 1011.

administrative decision to disclose is sought under the APA, it is subject to reversal if arbitrary, capricious, an abuse of discretion "or otherwise not in accordance with law."[14] The fact that a contrary statute will prevent the exercise of any discretionary authority in the agency to release exempt information follows because it is settled that the FOIA does not repeal directly or by implication any other statutes which may

limit or restrict the disclosure of information by public officials, and those other statutes remain in full force and effect despite the enactment of the FOIA.[15] Thus if there is some other statute or regulation which prohibits the disclosure of the exempt information, there is no agency discretion and "the [government] agencies have no alternative but to follow the legislative mandate" or agency regulation and to deny disclosure.[16] This follows because, whenever disclosure of the information in question would be violative of some other federal statute, both its exempt-character under the FOIA and its nondisclosability are thereby established.[17] This conclusion results from the Act's own

[15] *FAA Administrator v. Robertson* (1975) 422 U.S. 255, 265; *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Balt.* (4th Cir. 1974) 508 F. 2d 945, 950.

[16] Note, *Freedom of Information: The Statute and the Regulation*, 56 *Geo.L.J.* 18, 34 (1967).

Cf., also, EPA v. Mink (1973) 410 U.S. 73 at 95, note, (Stewart, J., concurring):

> "Similarly rigid is [exemption 3], which forbids disclosure of materials that are 'specifically exempted from disclosure by statute.' Here, * * * the only 'matter' to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, * * *."

[17] *Ibid.*, 1976 *Duke L.J.* at 340.

In this article the editor correctly states that a FOIA-plaintiff "need show only that disclosure would violate a particular federal statute in order to prove both that the information is FOIA-exempt and also that disclosure must be enjoined. Once it is determined that a specific statute prohibits the disclosure of certain information, the information is by definition exempt from mandatory disclosure under the statutory exemption of the FOIA. At the same time, disclosure which would violate a statute may be enjoined under the APA as agency action which is 'not in accordance with law.'"

exemption of all matters that are "specifically exempted from disclosure by statute,"[18] and from the holding in *FAA Administrator v. Robertson, supra,* 422 U.S. at 265, discussed later, that the FOIA does not repeal or modify any other statute which may restrict disclosure.[19]

In these cases, the plaintiffs assert that both the Civil Rights Act of 1964, Title VII, § 709(e), 42 U.S.C., § 2000e-8(e), and § 1905, 18 U.S.C., which prohibit under criminal penalty the disclosure by any federal employee of confidential trade and financial information supplied a federal agency, represent statutes embraced within exemption (b)(3) of the FOIA, and are statutes which prohibit the release of much of the information in the two reports in question. They raised this contention in thier objection to disclosure submitted administratively to the defendants. The defendants, however, dismissed the claim under both statutes. They specifically found that § 2000e-8(e) did "not prohibit the release of information by officers or employees of other Government agencies where such information is obtained under other authority as E.O. 11246 which requires contractors having a contract, containing provisions prescribed in Section 202 of said E.O. to file Compliance Reports and furnish such information." The same objections to disclosure, based upon both § 1905 and § 709(e), were pressed in the District Court.[20] That Court, is disposing of the claims,

[18] § 552(b) (3).

[19] 422 U.S. at 265.

[20] The plaintiffs, also, claimed exemption under (b) (7), which deals with investigatory files. The District Court found such a

stated that 709(e) of the Civil Rights Act of 1964 was not applicable since the reports involved here were filed, not under the provisions of the Civil Rights Act of 1964, but under Executive Order 11,246. It did not deal specifically with § 1905 as within the exemption of (b)(3) of the Act but it did conclude that § 1905, taken in conjunction with (b)(4), represented a clear prohibition against disclosure of "confidential" material as defined in (b)(4) of the Act and in § 1905. The plaintiffs, by their cross-appeal, renew their contentions under § 709(e).

So far as a claim under § 709(e) is concerned, we are inclined to agree with the District Court that, despite the persuasiveness of the argument to the contrary, and the cogent reasoning advanced by Justice Douglas in his opinion disposing of a request for a stay in *Chamber of Commerce v. Legal Aid Society* (1975) 423 U.S. 1309, the information involved here cannot claim immunity under § 709(e) as a statute forbidding dis-

---

claim without merit. The 1974 amendments to the Act, which are applicable here, fully support this conclusion. *See, Ibid.*, 1976 *Duke L. J.* at 399-401. Those amendments, the Court declared in *NLRB v. Sears, Roebuck & Co., supra*, 421 U.S. at 164-5, extend this exemption "only to * * * 'the production of such records [which] would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, [or] constitute [an] * * * unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures.'" Obviously, the information in question cannot qualify under that standard and it is accordingly unnecessary to consider further this claim of the plaintiffs. *See,* Note, Fuselier and Moeller, *NLRB Investigatory Records: Disclosure Under the Freedom of Information Act*, 10 *U.Rich.L.R.* 541 (1976)

closure of the information in question in these actions.[21]

The applicability of § 1905, upon which the District Court rested its decision, is, however, considerably more compelling. This is because of the recent decision in *FAA v. Robertson.* There had been, prior to *Robertson,* considerable contrariety in the decisions of the District and Circuit Courts on the statutes properly within the scope of Exemption 3. Some of those conflicting decisions are cited by the Supreme Court in *Robertson,* 422 U.S. at 262-3, n. 6.[22] Among those statutes about which there has been such a difference of opinion is § 1905. Thus, in the early case of *Consumers Union of U. S., Inc. v. Veterans Admin.* (S.D.N.Y. 1969) 301 F. Supp. 796, 801-2, appeal dismissed on other grounds, 436 F. 2d 1363, it was assumed that § 1905 was within the coverage of Exemption 3 but the Court found that the information there involved did "not appear to contain trade secrets or other information mentioned in § 1905."[23] However, in a consistent line of cases, beginning with *Grumman Aircraft Engineer. Corp. v. Renegotiation Bd.* (D.C.Cir. 1970) 425 F. 2d 578, 580, n. 5, and continuing up to *Charles River Park "A",*

---

[21] *See, Sears, Roebuck and Co. v. General Services Admin.* (D.C. Cir. 1974) 509 F.2d 527, 529; *Huges Aircraft Company v. Schlesinger* (D.C. Cal. 1974) 384 F. Supp. 292, 295; *Legal Aid Society of Alameda County v. Shultz* (N.D. Col. 1972) 349 F. Supp. 771, 775-6.

[22] An interesting case, not listed in *Robertson* and which reached a contrary result to that in the District of Columbia decisions, later discussed, is *Nichols v. United States* (10th Cir. 1972) 460 F. 2d 671, 673, *cert. denied* 409 U. S. 966 (1972), involving items and material connected with the assassination of President Kennedy.

[23] To the same effect is *Pleasant Hill Bank v. United States* (W.D. Mo. 1973) 58 F.R.D. 97, 98, n. 1.

Inc. v. Department of H. & U.D. (D.C.Cir. 1975) 519 F. 2d 935, 941, n. 7, the District and Circuit Courts of the District of Columbia have held that § 1905 is not among the statutes referred to in § 552(b)(3).

In *Grumman,* the earliest of these cases, the rationale for this holding was stated to be that "section 1905 merely creates a criminal sanction for the release of 'confidential information.' Since this type of information is already protected from disclosure under the Act by 552(b)(4), section 1905 should not be read to expand this exemption, especially because the Act requires that exemptions be narrowly construed." In other words, § 1905 was found under this reasoning to be "co-extensive with exemption 4," which itself constituted "a *separate ground for non-disclosure" and accordingly* it was unnecessary to consider whether § 1905 fell within the third exemption of the Act since the result would be the same in any event.[24] In *M. A. Schapiro & Co. v. Securities and Exchange Com'nr.* (D.C. D. 1972) 339 F. Supp. 467, 470, the Court found another reason for denial of inclusion of § 1905 within (b)(3). It said:

> "* * * There is nothing in § 1905 of Title 18 that prevents the operation of the Freedom of Information Act. Moreover, the provision for documents specifically exempted from disclosure by statute [5 U.S.C. § 552(b)(3)] relates to those other laws that restrict public access to *specific* government records. It does not, as defendants allege, relate to a statute [such as § 1905] that

[24] *See Ditlow v. Volpe* (D.C. D. 1973) 302 F. Supp. 1321, 1324, *rev.* on other grounds 494 F.2d 1073.

> generally prohibits all disclosures of confidential information." [25]

Other cases from the District of Columbia have proceeded on this distinction between statutes which described *"specific"* records as nondisclosable and those which *generally* prohibited disclosure in finding § 1905 and like statutes not within (b)(3).[26] This reasoning was adopted in *Robertson v. Butterfield* (D.C. Cir. 1974) 498 F.2d 1031, 1033, n. 6, *rev. sub nom. FAA Administrator v. Robertson* (1975) 422 U.S. 255, where, in finding that nondisclosure under the authority of § 1504, 49 U.S.C., a statute which represented a general

[25] The holding in this case was summarized in O'Reilly, *ibid.*, p. 1135:

> "* * * The district court held * * * that the general nature of its prohibition prevented Section 1905's application to the FOIA exceptions for documents 'specifically exempted from disclosure by statute.' "

The District Court of New York had reached a similar result in *Frankil v. Securities and Exchange Commission* (S.D. N.Y. 1971) 336 F. Supp. 675, reversed without reference to this point, 460 F.2d 813, *cert. denied* 409 U.S. 889 (1972) but the later case of *Consumers Union, supra,* from the same District, 301 F. Supp. 796, seems to be contrary.

[26] Other cases, echoing the reasoning on this point in *Schapiro,* are *Sears, Roebuck & Co. v. General Services Admin.* (D.C. Cir. 1974) 509 F.2d 527, 529, and *Neal-Cooper Grain Company v. Kissinger* (D. D.C. 1974) 385 F. Supp. 769, 776. In *Neal-Copper,* the Court said:

> "The 'ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny.' The law in this Circuit, as stated *supra,* appears to be that 18 U.S.C. § 1905 is not sufficiently specific to come within Exemption (3). No more need be said on that score."

prohibition of disclosure of confidential information rather than of "specific" records, was not justified by reference to Exemption 3, the Court said:

> "18 U.S.C. § 1905 is a criminal statute prohibiting unauthorized disclosure of any information by a federal employee. There is nothing in the section which prevents the operation of the Information Act. It does not fall within the ambit of Exemption (3)," citing *Schapiro.*

Whether the Court in *Butterfield,* by its reference to the fact that § 1905 was a criminal statute, found in this any reason for excluding it from the scope of Exemption 3 is perhaps unclear. If it did, though, the decision manifestly is at variance with the later decision from the same court in *Parker v. Equal Employment Opportunity Commission* (D.C. Cir. 1976) 534 F.2d 977, where the Court found, after stating that "[t]he Supreme Court [in *FAA Administrator v. Robertson* (1975) 422 U.S. 255] has extended that exemption [*i.e.,* (b)(3)] beyond what may have been its narrowest compass," found the statute involved there, which was a criminal statute like § 1905, within Exemption 3. And in both *Tax Analysts & Advocates v. I.R.S.* (D.C. Cir. 1974) 505 F.2d 350, and *Freuhauf Corporation v. Internal Revenue Service, supra,* 522 F.2d 284, it was recognized that a criminal statute (§ 7213, 26 U.S.C.) would qualify under Exemption 3. There remain only two objections that (1) § 1905 does not contain language which "prevents the operation of the FOIA" and (2) that it is a general prohibition on disclosure rather than a prohibition against the disclosure of "specific" records. The Court in *Charles*

River Park effectively answered the first objection[27] and the Supreme Court in *FAA v. Robertson,* reversing *Robertson v. Butterfield,* it seems manifest, disposes finally and conclusively of both objections to § 1905 as qualifying under Exemption 3.[28]

The Supreme Court in *Robertson,* focusing upon Exemption 3, concluded (1) that it was not the intent of Congress in enacting the FOIA to repeal or amend in any way statutes then "extant" which restricted access to especific government information but intended that such statutes should remain in effect, and (2) that the term "specific" in Exemption 3 does not mean that such Exemption applies only to statutes restricting access to *named* documents but applies to statutes which *generally* direct government agencies to withhold.[29] And it specifically rejected the construction

---

[27] 519 F.2d at 522.

The reasoning of *Charles River Park* on this point may be summarized thus: Information "confidential" under the test stated in *National Parks and Conservation Ass'n. v. Morton, supra,* 498 F.2d at 770, is necessarily both within Exemption 4 of the FOIA, and the prohibition of § 1905. Since such information would be exempt from disclosure under the FOIA, its disclosure is not "authorized" under the FOIA and its disclosure is prohibited under § 1905.

[28] We had, to some extent at least, anticipated *Robertson* in our decision in *Sears v. Gottschalk* (4th Cir. 1974) 502 F.2d 122 at 128-31.

See, also, Citizens for a Better Environ. v. Dept. of Com. (N.D. Ill. 1976) 410 F. Supp. 1248, 1249-50.

[29] 422 U.S. 264-66.

The Court said at pp. 265-66:

> "• • • The term 'specific' as there used cannot be read as meaning that the exemption applies only to documents specified, *i.e.,* by naming them precisely or by describing the cate-

of the Exemption as phrased in *Schapiro.*[30]

It is true that *Robertson* did not identify § 1905 as a

gory in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task. Such a construction would also imply that Congress had undertaken to reassess every delegation of authority to withhold information which it had made before the passage of this legislation—a task which the legislative history shows it clearly did not undertake.

"* * * To spell out repeal by implication of a multitude of statutes enacted over a long period of time, each of which was separately weighed and considered by Congress to meet an identified need, would be a more unreasonable step by a court than to do so with respect to a single statute such as was involved in the *Regional Rail Reorganization Act Cases,* * * *. Congress' response was to permit the numerous laws then extant allowing confidentiality to stand; it is not for us to override that legislative choice."

[30] *See Citizens for a Better Environ. v. U. S. Dept. of Com.* (N.D. Ill. 1976) 410 F. Supp. 1248, 1249-50.

That *Robertson* is in effect a reversal of *Schapiro* and related cases is, also, the opinion of the editor in the Note, *Developments under the Freedom of Information Act—1975,* 1976 *Duke L.J.* 366 at 395-8. In that article, the editor refers to the view taken in *Robertson v. Butterfield* and like cases such as *Schapiro* and compares them with the construction of Exemption 3 as set forth by Judge MacKinnon in his dissent in *Schechter v. Weinberger* (D.C. Cir. 1974) 498 F.2d 1015, 1016. In that dissent, Judge MacKinnon assumed that Congress in enacting the FOIA was aware of the "extant" statutes prohibiting disclosure and reasoned that "[i]f Congress had not intended to include [a particular statute] within Exemption Three, it could easily have done so either by explicitly narrowing the coverage of the exemption or by amending" the statute in question. This construction of the Exemption is described as the "broadest" construction of the Exemption, "since it clearly rejects the notion that the FOIA can be read in any sense as repealing or modifying by implication a statute authorizing nondisclosure which existed prior to the enactment of the FOIA." *Ibid.,* at 396. The editor concludes that "[t]he construction of exemption 3 adopted by the Court in *Robertson* is similar in both

statute within the parameters of Exemption 3. But the conclusion seems inescapable that it was so considered. § 1905 certainly fitted the description of an "extant" statute as defined by the Supreme Court in *Robertson* and it represented the type of "general" prohibition of disclosure discussed therein. Moreover, the Court in *Roberston,* quoting from the legislative record, stated:

"* * * When the House Committee on Government Operations focused on Exemption 3, it took note that there are 'nearly 100 statutes or parts of statutes which restrict public access to specific Government records. *These would not be modified* by the public records provision of S.1160.'" (Italics in opinion) [31]

theory and consequence to the broad construction advanced by Judge MacKinnon." *Ibid.,* at 396.

Sears, Roebuck and Co. v. General Services Admin. (D.C. D. 1975) 402 F. Supp. 378, 381, n. 3 takes a contrary view but it is impossible to reconcile its conclusion with the decision of the Supreme Court in *Robertson* or of the Circuit Court in *Charles River Park.*

[31] *Ibid.,* 422 U.S. at p. 265.

In an early article on the FOIA, a writer anticipated the later ruling in *Robertson,* stating:

"There are nearly one hundred statutory provisions specifically restricting disclosure in one way or another. While they are phrased in various ways—such as specifically exempting from disclosure, prohibiting disclosure except as authorized by law, or providing for disclosure only as authorized by law—it is clear from the House Report that all of them are included in exemption (b)(3)."

Note, *Freedom of Information: The Statute and the Regulations,* 56 *Geo. L. J.* 18 at 33-4 (1967).

There can be little doubt that § 1905 was among those "nearly 100 statutes or parts of statutes * * * not * * * modified" or repealed by the FOIA and intended to be covered by Exemption 3, to which the Congress and the Court in *Robertson* referred. And the Attorney General in his Memorandum Opinion on the scope and application of the Act, as quoted in *Robertson v. Butterfield, supra,* 498 F.2d at 1033-4, n. 6, regarded § 1905 as such. Further, § 1905 had been earlier identified in legislative hearings as a statute which prohibited disclosure.[32] In *Weisberg v. Department of Justice* (D.C. Cir. 1973) 489 F.2d 1195, 1202, *cert. denied* 416 U.S. 993 (1974), an *en banc* decision of the very Circuit that had espoused the doctrine of *Schapiro,* the Court referred to the Regulations of the General Services Administration, as set forth in 41 C.F.R. § 105-60.604 (1972) for a listing of illustrative statutes considered to be within Exemption 3. The first statute on that list is § 1905.[33] Indeed, the Department of Labor itself has assumed that § 1905 is among the statutes incorporated

[32] *See* 1958 Hearings before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, pp. 985-7.

[33] 41 C.F.R. § 105-60.604 reads as follows:

"(a) 5 U.S.C. 552(b)(3) provides that the statute does not apply to matters that are specifically exempted from disclosure by other statutes. (For further discussion of this matter, see the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, (June 19, 1967), pages 31 and 31).

(b) The following are illustrative of such statutes, but are not all inclusive:

(1) 18 U.S.C. 1905 (trade and financial information provided in confidence by businesses).

* * *"

within Exemption 3, for in its Regulations on disclosure, it forbids any employee under its control or delegation to disclose any records or information within the prohibition of § 1905.[34] In fact, this Regulation of the Department of Labor, *by which the defendants in the stipulation in the United States Steel Case admitted they were bound, since they only act in these matters by delegation of the Department of Labor,* has the effect of law and would itself meet the qualifications of Exemption 3. And such was the specific holding in *Chrysler Corp. v. Schlesinger* (D. Del. 1976) 412 F. Supp. 171, 177, involving an identical claim to that asserted here, and being against the same defendants as in these cases.[35] In the *Chrysler Case,* the court said:

> "5 U.S.C. § 301 is the general statute providing for the promulgation of regulations for the use and custody of government records. Pursuant to

[34] 29 C.F.R. § 70.21(a) is as follows:

"Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law."

[35] 392 F. Supp. at 1250.

this statute, the Secretary of Labor promulgated 29 C.F.R. § 70.21(a) which is applicable to DSA as a delegate of powers of the Department of Labor's OFCC. (*See,* 41 C.F.R. § 60-1.6)."

We accordingly think the District Court in these cases properly found that § 1905 is a statute qualifying under Exemption 3, both specifically as one of the "100 or more" statutes included therein, and by incorporation thereunder of the applicable Regulation of the Department of Labor,[36] and could have decided the cases on that basis,[37] as we later indicate.

---

[36] The author in the Note in 70 *Nw. U. L. Rev.* at 1016 would find § 1905 not to be a restriction on disclosure, "[b]ecause reliance on section 1905 would restrict unduly the court's ability to determine whether the information should be disclosed," and it "is perceived as a relic of an earlier age of government secrecy." It based this comment largely on a recommendation of the Sub-committee on Government Operations, made to the House Committee on the Judiciary, that § 1905 be repealed so that it would not be an impediment to disclosure. The Congress, however, has not repealed § 1905. This fact, under the reasoning of Judge MacKinnon in *Schechter,* note 28, which was adopted later in *People of State of California v. Weinberger* (9th Cir. 1974) 505 F.2d 767, 768, and received final approval in *Robertson,* would seem fairly conclusive evidence of legislative intent not to remove § 1905 as a prohibition against disclosure, qualifying as such under Exemption 3. In any event, in the absence of actual repeal, it is not, under Chief Justice Burger's language in *Robertson,* the function of courts to do what Congress has failed to do. We might note parenthetically, too, that the author at no point cites or refers to *Robertson,* which it would seem invalidates his conclusion.

Even if the author were correct in his analysis, the defendants would not be aided in their defense of these cases. The regulation of the Department of Labor, which they stipulated as controlling, incorporated the restrictions of § 1905 *eo nomine* and a violation of such regulations would justify relief in any event. *See United States v. Heffner* (4th Cir. 1969) 420 F.2d 809, 811-12.

[37] This was the criticism directed at the decision in *Charles River*

But whether the information be deemed exempt under the FOIA or prohibited from disclosure under § 1905, the defendants would deny completely any jurisdiction in the District Court to make a determination to that effect at the instance of the plaintiffs who were the suppliers of the information.[38] They contend the FOIA provides a procedure to compel disclosure and that is the *exclusive* remedy available under the Act. Under this argument, a requestor of government information, if denied access, is entitled under the Act to a *de novo* judicial hearing on his right to obtain the information but the Act not only does not give, it precludes any remedy in favor of a supplier of private "confidential" information to a governmental agency under statutory or administrative compulsion. The latter, under this argument, is completely remediless if the agency determines to release the information, despite the fact that such information be confidential private information, exempt under Exemption 4 and within the prohibition of disclosure under § 1905, which, if released, will inflict competitive injury on him. It would seem sufficient answer to this argument that this position of the defendants, though often

---

by the writer in Note, *Developments Under the Freedom of Information Act—1974,* 1975 *Duke L. J.* 416, 428, n. 56, noted *infra.*

[38] We group § 1905 and Exemption 4 together because it has been uniformly held that the scope of § 1905 and Exemption 4 of the FOIA are, as stated in *Pharmaceutical Manufacturers Ass'n. v. Weinberger* (D.C.D. 1975) 401 F. Supp. 444 at 446, "the same," or, as put in *Ditlow,* 362 F. Supp. at 1324, "co-extensive." Accordingly, material qualifying for exemption under (b)(4) falls within the material, disclosure of which is prohibited under § 1905. And this was the specific holding in *Charles River Park* (519 F.2d pp. 941-2 and n. 7). *See, also,* n. 27, *supra.*

raised, has never been accepted by any court. As one commentator has concluded, after an exhaustive review of all the reverse-FOIA cases, "no court has [ever] failed to find jurisdiction," in such cases, though he adds "there has been substantial disagreement as to the proper basis for this finding." Note, *Protection from Government Disclosure—The Reverse-FOIA Suit,* 1976 *Duke L. J.* 330, 347; *see, also,* Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,* 70 *Nw. U. L. Rev.* 995, 999-1000; *Charles River Park "A", Inc. v. H. & U.D.* (D.C. Cir. 1975) 519 F.2d 935, 939; *Sears, Roebuck and Co. v. General Services Admin.* (D.C. Cir. 1974) 509 F.2d 527 (jurisdiction assumed without discussion); *Chrysler Corp. v. Schlesinger* (D. Del. 1976) 412 F. Supp. 171, 174-5; *Burroughs Corporation v. Schlesinger* (C.D. Cal. 1974) 384 F. Supp. 292, 294; *Westinghouse Electric Corporation v. Schlesinger* (E. D. Va. 1974) 392 F. Supp. 1246, 1248; *United States Steel Corp. v. Schlesinger* (E.D. Va. 1974) 35 Ad. L. 2d 790 jurisdiction assumed without discussion); *McCoy v. Weinberger* (W.D. Ky. 1974) 386 F. Supp. 504, 507-8; *Neal-Cooper Grain Company v. Kissinger* (D. D.C. 1974) 385 F. Supp. 769 (jurisdiction assumed without discussion); *Hughes Aircraft Company v. Schlesinger* (C.D. Cal. 1974) 384 F. Supp. 292, 294.[39] And this as-

[39] In *Neal-Cooper Grain Company v. Kissinger* (D.C. D. 1974) 385 F. Supp. 769, 775, the Court noted that in the District Court decision in *Charles River Park* (360 F. Supp. 212).

> "[t]he Court held that the FOIA did not apply to the case because it was passed for the benefit of parties seeking disclosure, apparently concluding that it thus had no relevance to a claim seeking to bar disclosure.

sumption of jurisdiction seems to have recently received approval in *Renegotiation Board v. Bannercraft Co.* (1974) 415 U.S. 1, 17. In that case, the same argument as is pressed by the defendants here was advanced, *i.e.,* that the remedy expressly given under the FOIA "constitute[s] the *exclusive* method" under the Act and "that any implication of other injunctive power * * * would be inconsistent with the statutory language." In answer, the Court, after noting "'the broad equitable jurisdiction that inheres in courts * * * where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest'"[40] held:

"The broad language of the FOIA, with its ob-

> "*Charles River* was one of the first 'reverse-FOIA' suits to come to the courts. Developments since that time have, in the opinion of the Court, made it clear that the FOIA does apply to such matters. In National Parks & Conservation Assoc. v. Morton, plaintiffs sought to compel disclosure of information which has been supplied to the government on a confidential basis. The District Court had granted summary judgment to defendant on the basis of the confidentiality exemption to the FOIA. The Court of Appeals remanded, saying that the lower court must examine the material to determine if the informational disclosure would either impair the Government's ability to obtain information in the future or harm the competitive position of the supplier of information. In so doing, the Court recognized both that the policy of the FOIA was to encourage disclosure and that the purpose of the confidentiality exemption was to protect the rights of suppliers of information. After Morton, there would seem little doubt that the FOIA does apply to a suit seeking to prevent disclosure."

[40] Quoting from *Porter v. Warner Holding Co.* (1946) 328 U.S. 395, 403.

vious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do, *Scripps-Howard, supra,* 316 U.S., at 17; and the fact that the Act, to a definite degree, makes the district courts the enforcement arm of the statute, 5 U.S.C. § 552(a)(3), persuade us that the *Babcock* and *Switchman's Union* principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." (pp. 19-20)

It follows, therefore, that the supplier of information, protected from disclosure under the overall policy expressed in an exemption to the FOIA, or under a specific statutory prohibition such as § 1905, is not without a remedy, in a proper case, to challenge the right of an agency to disclose material furnished the agency under a claim of confidentiality; and the argument of the defendants to the contrary is without merit. The real issue thus becomes the type of remedy available to the supplier in such a case.

It is the defendants' position that, if the plaintiffs are entitled to any judicial remedy in these cases, it must be solely under the review procedures provided under the Administrative Procedure Act,[41] that there

[41] § 706, 5 U.S.C.

can be no other basis for subject-matter jurisdiction. This argument of the defendants seems to have been faced directly in but one reported case, *Charles River Park "A", Inc. v. H. & U.D.*[42] In that case, the Court began initially with the assumption that § 1905 did apply and, on that basis, found federal-question jurisdiction.[43] On reargument, however, it withdrew its holding to this effect, reasoning that "review under the APA, the normal method of reviewing agency action, is sufficient to safeguard any interests that section 1905 is supposed to protect."[44] To some extent, the Court was undoubtedly influenced in this conclusion by the previous rulings of the Circuit in *Grumman,*[45]

[42] 519 F.2d 935.

[43] *See, Pharmaceutical Mfrs. Ass'n. v. Weinberger* (D.C.D. 1976) 411 F. Supp. 576, 577, n. 1:

> "The published opinion in *Charles River Park* withdrew the slip opinion's observation (found in footnote 5) that 18 U.S.C. § 1905 created a private right of action. The court held instead that review under the Administrative Procedure Act is available."

It seems quite clear that had the Court in *Charles River Park* had the benefit of the later decision in *FAA v. Robertson,* it would not have receded from its initial decision that § 1905 provided a basis for federal subject-matter jurisdiction and would have granted the plaintiff the full evidentiary hearing to which such a proceeding would have entitled the plaintiff. In such an action, there would have been no basis for an APA review, since § 1905 does not admit of administrative discretion, the review of which is the purpose of APA review.

Cf., Note, 1976 *Duke L. J.* at 342 ("* * * section 1905 does not speak in terms of discretion * * *").

[44] 519 F.2d at 941, n. 6.

[45] 425 F.2d 578.

Schapiro[46] and similar cases, discussed *supra,* that § 1905 is not within Exemption 3, though it is interesting that the Court, somewhat reluctant to reaffirm completely *Schapiro* and *Grumman,* said somewhat cryptically that "5 U.S.C. § 552(b), does not incorporate section 1905 into the FOIA in such a way as to make section 1905 broader than the fourth exemption" and conclude with the statement that, "[s]ince only the FOIA's fourth exemption deals with matters covered by section 1905, consideration of section 1905 in FOIA cases is appropriate only when the information falls both within the fourth exemption and under section 1905."[47] In short, it construed § 1905 and Exemption 4 as "co-extensive" in scope[48] and held that, if the material were exempt from disclosure under Exemption 4 of the FOIA, it was automatically prohibited from

[46] 339 F. Supp. 467.

[47] 519 F.2d 941-2, n. 7.

It is of interest that *Charles River* is criticized in the Note, 1975 *Duke L. J.* at 428 as "a thoroughly unsatisfactory decision" and the rationale of its criticism was that "[t]he issue in the case should have been whether section 1905 specifically exempted the information from disclosure under the statutory exemption, 5 U.S.C. § 552(b)(3) (1970)—a position uniformly rejected by other statutes, see note 76 infra—and, if so, whether a private party can invoke the exemption." We agree, as we later indicate, that the applicability of § 1905 was a critical issue in that case, as it is in these cases. But, in *Charles River,* the panel was writing for a court, which, not yet supplied with the authoritative construction of Exemption 3 as declared in *Robertson* was bound by its earlier decisions giving that exemption a restricted application and assimilating § 1905 with Exemption 4 by finding that the two were "co-extensive."

[48] *Pharmaceutical Mfrs. Ass'n. v. Weinberger, supra,* 401 F. Supp. at 446; *Ditlow v. Volpe, supra,* 362 F. Supp. at 1324.

disclosure under § 1905.[49] And it held that this determination could be made through the review procedure made available under the APA, though, as one commentator has observed, "the court in *Charles River Park 'A', Inc. v. HUD* indicated that it would imply a private right of action under section 1905 in the appropriate situation."[50] *Charles River Park* thus is not authority for the proposition that the plaintiffs' remedy here is solely and exclusively under the APA simply because in that case it proceeded under the APA. In fact, any such rule would create a jurisdictional anomaly, under which a federal court in one district might afford the supplier a remedy which would be denied him in another federal district. This result follows from the great difference among the Circuits, and in the opinion of the commentators, on whether the APA confers federal subject-matter jurisdiction.[51] Such difference is illustrated by the de-

[49] O'Reilly, *ibid.,* 30 *Bus. Law.* at 1137, summarizes this ruling of the Court:

> "[a]fter a rejection of section 1905's use as a 'specifically exempted by statute' protection under the Freedom of Information Act, the *Charles River* opinion gave that confidentiality statute a new usefulness."

[50] Note, 1976 *Duke L. J.* at 350.

[51] This difference of opinion on whether the APA confers independent subject-matter jurisdiction, is illustrated in the contrary views of two respected commentators. Professor Davis in Administrative Law of the Seventies, § 23.02, p. 530 (1976 Supp.) finds the clear weight of authority in favor of subject-matter jurisdiction under the APA; 13 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 3568, pp. 465-6 (1975 ed.) is equally certain that the "majority view" is expressed by those courts which have rejected the argument that the Administrative Procedure Act is a grant of jurisdiction.

cisions in *Charles River Park* and *Chrysler Corp. v. Schlesinger*. The first arose in the District of Columbia, where the rule prevails that the APA confers subject-matter jurisdiction;[52] the second arose in the Third Circuit, which has found that APA confers no such jurisdiction.[53] If the defendants were correct in their contention, the plaintiff in *Charles River Park* would have a remedy but the plaintiff in *Chrysler* would be remediless. It is inconceivable that such a disparity in rights could be sanctioned in a unified judicial system.[54]

Littell v. Morton (4th Cir. 1971) 445 F.2d 1207, 1212-13; *McEachern v. United States* (4th Cir. 1963) 321 F.2d 31, 33, and *Deering Milliken, Inc. v. Johnston* (4th Cir. 1961) 295 F.2d 856, 865, it seems support the view that in this Circuit the APA is regarded as granting federal subject-matter jurisdiction; at least Hart & Wechsler, *The Federal Courts and the Federal System*, p. 1161, n. 6 (1973 ed.) so construe *McEachern*, and *Ortego v. Weinberger* (5th Cir. 1975) 516 F.2d 1005, 1011, finds *Littell* to recognize that the APA confers jurisdiction. However, the District Court decisions in this Circuit, as well as those outside, "are approximately equally divided on whether the APA is an independent jurisdictional grant." 516 F.2d at p. 1011. *Compare, Etheridge v. Schlesinger* (E.D. Va. 1973) 362 F. Supp. 198, 200-1; *River v. Richmond Metropolitan Authority* (E.D. Va. 1973) 359 F. Supp. 611, 622, *aff'd.* on other grounds, 481 F.2d 1280, and *Garmon v. Warner* (W.D. N.C. 1973) 358 F. Supp. 206, 208 (all sustaining jurisdiction under APA), with *International Fed. of P. & T. Eng., Loc. No. 1 v. Williams* (E.D. Va. 1974) 389 F. Supp. 287, 291, *aff'd.* without opinion, 510 F.2d 966; *Hagedorn v. Union Carbide Corporation* (N.D. W.Va. 1973) 363 F. Supp. 1061, 1063, and *Yahr v. Resor* (E.D. N.C. 1972) 339 F. Supp. 964, 967, *aff'd.* on other grounds, 431 F.2d 690 (all to the contrary, denying subject-matter jurisdiction under APA).

[52] 519 F.2d at 939.

[53] 412 F. Supp. at 174-5.

[54] It was this very uncertainty of a remedy, arising if the APA were held to be the exclusive procedure available to the supplier of

But even if the method of review under the APA as approved in *Charles River Park* were followed in these cases, the procedure would not have been substantially different from the procedure actually followed by the District Court. The only action taken by the District Court at trial, to which the defendants object, is that it held an evidentiary hearing in these cases and received evidence from both plaintiffs and defendants on the single issue of "confidentiality" of the information under review, as defined in *National Park and Conservation Ass'n. v. Morton, supra,* 498 F.2d 765.[55] They contend the District Court was forbidden from holding such evidentiary hearing and was

---

information, that caused the writer of the Note in 70 *Nw. U. L. Rev.* at 1007 to opt for a § 1331 action. He said:

> "The uncertainty of the APA as an independent jurisdictional grant makes the statutory grant of 'federal question' jurisdiction in section 1331 of Title 28 of the United States Code the most likely basis for jurisdiction in reverse-FOIA suits."

[55] This definition of "confidentiality" as stated in *Morton,* is:

> "To summarize, commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (p. 770)

For an exhaustive review of the progress in development of the definitive standard for construing the terms of Exemption 4 of the Act, *see* Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act,* 60 *Cornell L. Rev.* 109, 113 (1974), and *Ibid.,* 74 *Colum. L. Rev.* at 948-53.

There is, also, an extensive note on this exemption in 21 A.L.R. Fed. 224, *et seq.,* and it is discussed at length in 41 *U. Chi. L. Rev.* at 572-5, as well as Note, 9 *Akron L. Rev.* at 675-81.

required to render its decision on the administrative record, consisting almost entirely of the agency's *ipse dixit* that the information in question was disclosable under the Act and was not protected under either Exemption 4 or § 1905. Specifically, their position is that the District Court had no right to receive any evidence on the qualification of the challenged material as "confidential" under the standard mandated in § 1905 and Exemption 4, which, according to the decisions, as we have seen, are the "same" or "co-extensive." [56]

Charles River Park, however, holds exactly to the contrary: it declares that, even in an APA review, the District Court should have an evidentiary hearing to determine whether, on the evidence adduced, the challenged material is "confidential" and thereby exempt from disclosure under Exemption 4 and prohibited from disclosure under § 1905. In that case, the Circuit Court did not instruct the District Court to look to the administrative record, or the decision of the agency, in order to determine whether the information in question was "confidential" and thus within the exemption prohibited by Exemption 4 of the FOIA, and within the prohibition of § 1905; on the contrary, it directed the court to follow the following procedure on remand:

> "* * * Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. See 5 U.S.C. § 552(b)(3);

[56] *See, Pharmaceutical Manufacturers Ass'n. v. Weinberger,* 401 F. Supp. at 446; *Ditlow v. Volpe,* 362 F. Supp. at 1324.

> National Parks & Conservation Assn. v. Morton * * *. In holding this hearing, the district court is not reviewing agency action; it is making a threshold determination whether the plaintiff has any cause of action at all." [57]

It went on to add that, on remand, the District Court should "consider 18 U.S.C. § 1905 and determine whether the information sought falls within the specific prohibitions therein contained," previously stated as "co-extensive" with Exemption 4. And it added that, "[i]f it does, it would be an abuse of discretion for HUD to release the information" and "to ignore such a statutory mandate." It concluded by remanding the cause because "[a]n evidentiary hearing will be necessary since the present record is not sufficient to make the above determination." [58]

[57] 519 F.2d at 940-41, n. 4.

What the court is stating here is that, until it is determined that the information is within an exemption, the agency has no discretion to exercise and no basis for review under the APA. This is what it describes as the "threshold" question. This follows, since if the information is not exempt, the Act commands disclosure; but, if, on the other hand, the information is exempt, then the agency ordinarily has discretion, the exercise of which is reviewable under APA standards.

See, also, Note, 1976 *Duke L. J.* at 345, n. 73:

> "The court of appeals in *Charles River,* however, directed the lower court on remand to hold an evidentiary hearing on the threshold question of whether the information is exempt under the FOIA."

[58] 519 F.2d at 942-3.

As construed in *Pharmaceutical Mfrs. Ass'n. v. Weinberger, supra,* 411 F. Supp. at 577-8, *Charles River Park,* in remanding the case, directed the District Court to follow "[a] three step process * * *: determination of whether the material fit within a FOIA

It follows that, were review here available under the APA, the procedure followed by the District Court was free of error.[59] But the District Court did not find

---

exemption; consideration of the prohibitions of 18 U.S.C. § 1905; and (assuming the pertinence of a FOIA exemption and the inapplicability of 18 U.S.C. § 1905) examination of the agency's discretionary decision to release. 519 F.2d at 943. Such judicial review is under the Administrative Procedure Act and appropriate remedies include injunctive relief. 519 F.2d at 939, 941-42 & n. 6."

See, also, Burroughs Corporation v. Schlesinger (E.D. Va. 1975) 403 F. Supp. 633 at 637, where Charles River Park was construed:

> "* * * The Circuit Court for the District of Columbia has suggested that a District Court hold appropriate hearing whenever evidence is insufficient on the issue of substantial harm. *Charles River Park "A", Inc. v. H.U.D., supra,* 519 F.2d at 940, 943-944 (D.C. Cir. 1975). This suggestion is well taken. The defendants, in the meantime, shall remain enjoined from disclosing the Recap Table pending a final decision after such hearings are held."

[59] We may add that, even when review is sought under the APA, the plea of sovereign immunity, as asserted by the defendants, will not be sustained. The defendants rely on *Littell v. Morton* (4th Cir. 1971) 445 F.2d 1207. Their reliance in this regard on *Littell v. Morton* is misplaced. It is true that in *Littell* we did not follow the lead of those cases which had found in the APA itself a waiver of sovereign immunity. But we took note of the increasing judicial distaste for the doctrine of sovereign immunity and the unanimous condemnation of the doctrine by academic commentators. We accordingly narrowed the doctrine in actual application within a very restricted compass, as established by its rational justification. We stated that, under the impetus of an increasing "weakening of general faith in the validity of the doctrine" its only remaining "rationale [for existence] boils down to substantial bothersome interference with the operation of government." *Ibid.*, at 1214.

This statement is not substantially different from that articulated by Professor Cramton in his notable article, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant,* 68 *Mich. L. Rev.* 389 at 397 (1970):

jurisdiction under the APA in these cases; its jurisdictional base rested upon the general federal-question jurisdiction under § 1331.[60]

§ 1331 grants original jurisdiction to the District Court over any action that "arises under the Constitution, laws, or treaties of the United States." And we agree with the trial court that these cases meet the jurisdictional requirements of § 1331. The information, the disclosure of which the plaintiffs seek by their action to prevent, was filed under the compulsion of a valid Executive Order issued under federal authority; the disclosure of such information, it was alleged, is exempt from compelled disclosure under the terms of both subsections § 552(b)(3) and (4) of the FOIA and its

---

> "* * * The only rationale for the doctrine [of sovereign immunity] that is now regarded as respectable by courts and commentators alike is that official actions of the Government must be protected from undue judicial interference."

These suits, if sustained, will not interfere in the slightest with the performance by the Government or its agents under the Executive Order; any decree entered herein would not curtail the power of the Government to enforce the Executive Order. Actually, the Government itself has no real interest in these suits; the only parties that may suffer are the plaintiffs through the disclosure of confidential information harmful to their competitive position and the only parties to be benefitted, if the plea is sustained, are the private parties who for their own personal curiosity desire the information. *Littell* can accordingly give them no support; on the contrary, it is compelling authority against the validity of the plea. The editor in the Note, *supra,* 1976 *Duke L. J.* 358, concludes also that *Littell* would not bar a suit such as these reverse-FOIA cases.

[60] *See, Burroughs Corporation v. Schlesinger, supra,* 403 F. Supp. at 634; *Chrysler Corp. v. Schlesinger, supra,* 412 F. Supp. at 174-5; and *Hughes Aircraft Company v. Schlesinger, supra,* 384 F. Supp. at 294.

disclosure is forbidden under § 1905, 18 U.S.C. On the basis of those allegations, the plaintiffs invoked the equitable jurisdiction of the federal court to secure an injunction against disclosure. Such jurisdiction, it would seem, would exist both as an action to enjoin the violation of the positive mandate of § 1905 by an executive officer and as an action implied under the very terms of Exemption 4 of the FOIA itself. Both such grounds would rest on a federal statute and qualify under § 1331.

It would be a violation of both logic and reason to find that an action by one who is faced with substantial competitive harm and injury by the threat of disclosure of information, submitted by him solely because of the compulsion of a federal Executive Order, validly issued under federal law by a federal agency, whose officers are forbidden by federal law to disclose such information (as does § 1905), is not an action arising "under the * * * laws, * * * of the United States." It has been well stated that "[i]t is an inherent power of the federal judiciary to enjoin * * * an act" sought to be carried out by a federal official in violation of federal law, and "[t]hat there be such [judicial] power was one of the prime compelling reasons for the creation of the judicial branch as an independent and equal branch of the Government."[61] And this power of a federal court to grant injunctive and declaratory relief under § 1331 against the threat of action by a public officer "in excess of [his] delegated powers and contrary to a specific [federal statutory] prohibition"

[61] *Fleming v. Moberly Milk Products Co.* (D.C. Cir. 1947) 160 F.2d 259, 264, appeal dismissed 331 U.S. 786 (1946).

such as § 1905, causing irreparable harm to a private person, has been repeatedly recognized and exercised.[62] The principle is plainly applicable in actions such as these under review and affords federal subject-matter jurisdiction under § 1331(a).[62a]

We accordingly have, as we have said, no difficulty in finding that the District Court had jurisdiction of these actions under § 1331 to enjoin an action by the defendants in violation of § 1905.

Should, however, the contention of the defendants be accepted that § 1905 is inapplicable, the FOIA itself, it would seem, confers on a supplier of *private* information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within

[62] *Leedom v. Kyne* (1958) 358 U.S. 184 at 188-90; *Borden, Inc. v. F.T.C.* (7th Cir. 1974) 495 F.2d 785, 787, ("the agency has clearly violated a right secured by statute or agency regulation"); *Elmo Division of Drive-X Company v. Dixon* (D.C. Cir. 1965) 348 F.2d 342, 344-6.

See, also, McQueary v. Laird (10th Cir. 1971) 449 F.2d 608, 611, *Zirin v. McGinnes* (3d Cir. 1960) 282 F.2d 113, 115, *cert. denied* 364 U.S. 921 (1960), and *Green v. Connally* (D.C. three-judge ct. 1971) 330 F. Supp. 1150, 1172, *aff'd. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

In *McQueary*, the court said:

> "If a federal officer does or attempts to do acts which are in excess of his authority or under authority not validly conferred, equity has jurisdiction to restrain him."

Green is perhaps more forceful:

> "The Federal courts have power to correct improper or inadequate action of Federal officials not only, as in the case of State officials, for failure to observe constitutional limits, but also for failure to act in consonance with pertinent Federal legislation."

[62a] The District Court found the presence of the jurisdictional amount under § 1331 and the defendants have not contested this finding of jurisdictional amount.

Exemption 4. To understand this exemption and to determine its scope and application, we must look first to the legislative intent or purpose in enacting the FOIA itself. It is clear that the Act's basic purpose "was to protect the people's right to obtain information about their government, to know what their government is doing and to obtain information about government activities and policies" and to remedy the "mischief" of "arbitrary and self-serving withholding, by agencies which are not directly responsible to the people, of official information on how the government is operating through the use of vague phraseology in Section 3 of the Administration Procedure Act." [63]

[63] Note, *A Review of the Fourth Exemption of the Freedom of Information Act*, 9 *Akron L. Rev.* 673, 694 (1976). The full text on this point is:

> "One factor which seems to have received little attention in analyzing the purpose of Exemption 4 is that the mischief which Congress was attempting to remedy was the arbitrary and self-serving withholding, by agencies which are not directly responsible to the people, or official information on how the government is operating through the use of vague phraseology in Section 3 of the Administrative Procedure Act. The purpose of the Freedom of Information Act was to protect the people's right to obtain information about their government, to know what their government is doing, and to obtain information about government activities and policies. The Freedom of Information Act was not enacted for the purpose of enabling the public to obtain information about individuals and corporations, about what those individuals and corporations are doing, or about what their activities and policies are.
>
> "Disclosure of any information which corporations have traditionally kept secret for valid competitive reasons strikes at the heart of the free enterprise system and was undoubtedly what Congress intended to guard against when, in expressing the purpose of Exemption 4, it stated:
>
> " 'This exception is necessary to protect the confidentiality

"One cannot, however, review the hearings and committee reports accompanying the FOIA without recognizing that Congress was also deeply concerned with protecting an individual's right of privacy and thus designed some of the exemptions to accommodate what it perceived to be legitimate private as well as governmental interests." [64] (Italics in text) In drafting the Act, Congress sought carefully to balance the right of the public to know what its government was doing against the rights of the individual to the privacy of private confidential information [65] and to make clear

> of information . . . which would customarily not be released to the public by the person from whom it was obtained.' "

[64] The full text of this part of the Note in 1975 *Duke L. J.* at 431-2, is as follows:

> "One cannot, however, review the hearings and committee reports accompanying the FOIA without recognizing that Congress was also deeply concerned with protecting an individual's right of privacy and thus designed some of the exceptions to accommodate what it perceived to be legitimate *private* as well as governmental interests. Tests devised by courts interpreting the exemptions dealing with privately submitted material to determine whether certain information can be withheld under those exemptions have incorporated this desire to protect legitimate private interests, probably with the expectation that an agency will respect such interests and assert the exemption for their protection. * * * *Where the exemption was intended to protect the asserted private interest, an agency should respect the desire of the person submitting the information, and a court, consistent with the overall policy of the FOIA, may order the agency to withhold that information.*" (Italics added)

[65] *See*, S. Rep. 813, 89th Cong., 1st Sess. (1965):

> "The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interest of confidentiality."

the distinction between the right of the public to information and the right of the individuals to protection from disclosure of certain confidential private information. In summary, the Act was intended, to use the language of the Senate report, to set "up workable standards for what records should and should *not* be open to public inspection."[66] (Emphasis added) And one of the sections of the Act, which declared what private information acquired by the government "should *not* be open to public disclosure" was Exemption 4. That exemption declared that "commercial or financial information obtained from any person and privileged or confidential" should "*not* be open to disclosure." And, as we have already seen, the term "confidential," as used in the statute, covers information, the release of which would "cause substantial harm to the competitive position of the person from whom the information was obtained."[67] The protection from disclosure given such information by Exemption 4 was stated in the legislative hearings to have been granted to such information "*not only as a matter of fairness, but as a matter of right,* and as a matter basic to our free enterprise system."[68] (Italics added) In enacting such exemption, the Congress had balanced the right to public disclosure against the right of the private party to protection and had opted for the right to privacy in favor of the private interest.[69] This pro-

[66] S. Rep. No. 813, 89th Cong., 2d Sess. at p. 5 (1965).

[67] *See* 498 F.2d at 770.

[68] 498 F.2d at pp. 767-69, quoting from the Senate hearings.

[69] The author in 70 *Nw.U. L. Rev.* at 1017 is somewhat more limited in his approach. Under his construction of the Act and its

vision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest. And when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection. It matters not that the statute does not in express terms accord him that right. *Bannercraft,* as we have seen, disposed of the contrary argument by declaring that, in addition to the express grant of jurisdiction in the Act itself, there was available to any proper party the right to invoke the broad general jurisdiction of equity in the assertion of a right under the Act. And this would cover the right of the private party seeking the protection given by Exemption 4. The Court said as much in *National Parks and Conservation Ass'n. v. Morton, supra,* 498 F.2d at 770. It declared that "[t]he exemption [*i.e.,* Exemption 4] may be invoked for the benefit of

policies, an agency, if it chose to disclose material falling within Exemption 4, would be under a "burden • • • to demonstrate that the public interest requires disclosure of an individual's confidential information," and "absent a strong, countervailing public need to know," injunctive relief against disclosure is appropriate. The defendants made no such showing in this case. In fact, they made no real defense in *Westinghouse, see* 9 *Akron L. R.* at 683, and certainly not on this ground in the other cases. Even if the courts may engage in a balancing of interests, despite the prior balancing by Congress, there was no basis for such balancing in this case, as we later indicate.

the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position."[70] The Court in *Sears, Roebuck & Co. v. General Services Adm'n.* (D.C.D. 1974) 384 F. Supp. 996, 1001, echoed the same thought, putting it that "[a] decision to release information is no less susceptible to court review than a decision to deny disclosure." *Sears* was reversed in part and affirmed in part in 509 F.2d 527, but in so doing the Court of Appeals' decision has been construed as holding *"that a person submitting information to the government can invoke the FOIA exemptions to enforce nondisclosure of exempt material."*[71] (Italics added)

And the idea that the supplier of private information which may fall within Exemption 4 is entitled to seek independent judicial protection under the federal-question jurisdiction statute is approved generally by the legal commentators. Thus, in a recent Note in 70 *Northwestern L. Rev.* 995 (1976), titled *"Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection,"* the author states (pp. 998-9):

> "Although *National Parks* demonstrated a clear congressional intent to exclude confidential business materials submitted to a Government agency from the disclosure requirements of the FOIA, it is not clear *who* was intended to enforce that

---

[70] *See, Neal-Cooper Grain Company v. Kissinger, supra,* 385 F. Supp. at 775, as quoted *supra,* n. 41.

[71] Note, 1975 *Duke L. J.* at 429, n. 60.

right, the agency or the individual whose materials may be disclosed. Several reasons exist for preferring private civil actions over agency enforcement. First, from the perspsective of an individual required to submit information to the Government, the agencies cannot always be relied upon to protect adequately the confidentiality of that information. One commentator has stated: [O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act,* 30 *Bus. Lawyer* 1125, 1134 (1975)]

> 'Counsel for the agency, prime target of the disclosure-oriented FOIA has little or no incentive to protect the secrets of the business community. Exemption (4) [trade secrets and commercial or financial information] does not require confidentiality but leaves the burden on the agency to assert it. It may be bad for appearances in a period of "openness" and "honesty" for an agency to refuse disclosure from its files.'

"Moreover, the individual is more aware than the agency of the potential competitive harm he will suffer should information be released. Self-representation theoretically insures the plaintiff of both zeal and expertise in the advancement of this claim of confidentiality. Finally, an individual seeking to prevent disclosure may find his administrative remedies either nonexistent or inadequate. Virtually all agency regulations implementing the FOIA provide administrative appeal procedures for a decision to withhold information.

However, virtually no agency has established appeal procedures for a decision to disclose information.

"Therefore, absent the availability of reverse-injunctive suits, individuals would be unable to prevent effectively the economic injury to their businesses that could result from the release of trade information to a competitor. Such a check on agency action, it should be noted, is consistent with the FOIA's attempt to balance the goal of agency disclosure against the need to combat administrative arbitrariness and to protect certain rights of privacy and confidentiality." [72]

The same thought was set forth in the Note in 1975 *Duke L. J.* at 431-2:

[72] In this same article, the author, in developing the principle under which a supplier may directly challenge a decision to disclose exempt material, basing federal jurisdiction under § 1331 on the FOIA itself, said (p. 1011):

"It seems clear, therefore, that the FOIA does not automatically require relief for the reverse-FOIA plaintiff, because the Act does not forbid disclosure of exempted materials. Thus, relief must be predicated upon an indirect application of the FOIA in light of the policies underlying the Act and its exemptions. If a particular disclosure would be contrary to a policy of the Act, a court may properly find that an agency 'abused its discretion' in deciding to release the information —an approach coupling the policy considerations of the FOIA with the remedial provisions of the APA."

And then to make it clear, he is referring primarily to Exemption 4, the author adds in footnote 92:

"* * * For the policies, especially in a fourth exemption confidentiality question, may lead a court to conclude that a particular disclosure constitutes an abuse of agency discretion and therefore may be enjoined."

"* * * Where the exemption was intended to protect the asserted private interest, (which, we interpolate, was the obvious purpose of Exemption 4) an agency should respect the desire of the person submitting the information, and a court, consistent with the overall policy of the FOIA, may order the agency to withhold that information."

Actually, there seems to be no real dispute over the right of the private party to be protected from the disclosure of private confidential information qualifying under Exemption 4. The only issue is, as the writer of the article in *Northwestern Law Review* suggests, whether it is the agency or the private party who may invoke it. The writer of the Note in *Duke Law Journal,* just quoted, goes further and states that the "agency should respect the desire of the person submitting the information," and when the supplier claims the exemption, the agency should refuse disclosure. This suggestion seems to have been in the mind of the writer of the Note in 41 *University of Chicago Law Review* at 574, when he indicated that the agency should respect the claim to confidentiality under the exemption, thereby precipitating an action by the requestor, whereupon the supplier of the information could intervene in that action and secure a *de novo* trial on the confidentiality of the information under the Act. This, to say the least, is the circuitous way of protecting the rights of the supplier of the information. Moreover, there is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the

competitive position of a supplier of information. That is no part of its responsibility. Neither does it have, as has already been observed, in most instances, sufficient knowledge to assert properly the private party's right to confidentiality. And it must not be forgotten that the protection of a competitive position is both a valuable and often complex matter, dependent upon full proof,[73] and one "basic to our free enterprise system." Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that

[73] In 9 *Akron L. Rev.* at 683-4, the writer states:

"• • • Although there may be instances in our highly regulated economic system when basic economic principles no longer effectively operate, the industrial sector is still highly competitive. Corporations have varying numbers of market and financial specialists who continually search out fragments of information about competitors and markets from any available source; published government statistics and information, various legislative documents, analyses and surveys performed by consultants, field surveys performed by corporate specialists, information continually obtained and reported by sales personnel, or disclosures by government agencies. Since government-derived information is often submitted according to statutory or regulatory requirement, it is usually more credible than information from other sources; the latter usually depends on what a company decides, for its own carefully considered reasons, to make available. An additional reliable 'fragment' of information may be enough to bring the whole picture into much clearer focus and could conceivably mean the difference between success or failure in certain contract bidding situations. The importance of a court's decision on disclosure in any given case is magnified by the fact that a number of jobs and possibly the future of a business may hinge on obtaining a given contract, depending on the industry involved and a number of other factors."

right to protection from disclosure assured him under Exemption 4, in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him "not only as a matter of fairness but as a matter of right," seeks what may be regarded as correlative relief? This right was given him in *Charles River Park,* though incident to an APA review.[74] That it qualifies under statutory federal-question jurisdiction is the conclusion of the writers of the Notes in 1976 *Duke Law Journal* at 351-2 and in 70 *Northwestern Law Review* at 1008. In the latter Note, the editor states:

> "Although no clear test for deciding whether an action 'arises under' federal law has been developed, it can safely be said that a substantial claim based on an interpretation of a federal statute is sufficient to satisfy the arising under requirement. *In a reverse-FOIA suit, the plaintiff's claim for relief requires a determination of what commercial and financial information is confidential within the meaning of section 552(b)(4). Thus, it seems clear that such an action arises under federal law for purposes of statutory federal question jurisdiction.*" (Italics added)

[74] 519 F.2d at 940, n. 4:

"• • • Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure."

We agree. In our opinion, federal-question jurisdiction does exist for an implied action by the private party to protect his right to protection from disclosure, stated as a general over-all legislative policy in Exemption 4 of the FOIA.

Nor would the plea of sovereign immunity, so earnestly argued by the defendants, be any more available, where jurisdiction is invoked under § 1331, than it would be in an APA suit, to which we have already adverted."[75] It has been long accepted that an action to enjoin a federal official from doing an act beyond his statutory power or authority—the situation here where the threatened disclosure is alleged to be violative of the prohibition imposed upon the defendants both by § 1905 and by Department regulations—and violative of a right of privacy granted under Exemption 4 of the FOIA—represents an exception to the application of the plea of sovereign immunity. This was made clear in *Larson v. Domestic & Foreign Corp.* (1949) 337 U. S. 682, 689, *reh. denied* 338 U. S. 840 (1949), in which the Court said that, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. * * * His actions are ultra vires his authority and therefore may be made the object of specific relief."[76] This exception to the right of sovereign immunity has been often applied. Indeed, in *Ragland v. Mueller* (5th Cir. 1972) 460 F.2d 1196, 1197, a plea of sovereign immunity in a case for injunc-

[75] See note 59, *supra*.

[76] *See* Cramton, 68 *Mich. L. Rev.* at p. 404.

tive relief against proposed official action in violation of law was dismissed as "border[ing] on the frivolous." And in *De Masters v. Arend* (9th Cir. 1963) 313 F.2d 79, 85, *appeal dismissed* 375 U. S. 936 (1963), the Court said:

> "* * * However, it appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by the doctrine of sovereign immunity."

Recent cases to the same effect are *Eastern Kentucky Welfare Rights Org. v. Simon* (D.C. Cir. 1974) 506 F.2d 1278, 1282, *cert. granted* 421 U.S. 975 (1975); *Bowers v. Campbell* (9th Cir. 1974) 505 F.2d 1155, 1158; *State Highway Commission of Missouri v. Volpe* (8th Cir. 1973) 479 F.2d 1099, 1123. And other courts have specifically held that the doctrine was inapplicable where an agency or officer was proposing to take action illegal under any statute prohibiting disclosure of information exempt under FOIA.[77]

Since these actions find their jurisdiction properly based on § 1331 and since the doctrine of sovereign immunity is not applicable, the District Court properly received evidence, even though the evidence was largely expert testimony calculated to inform the court of the nature of the information so that the court could better determine whether it fell within the statutory definition

[77] *Charles River Park "A", Inc. v. Department of H. & U.D., supra,* 519 F.2d at 941, n. 7; *Sears, Roebuck & Co. v. General Services Admin., supra,* 509 F.2d at 529 and *Neal-Cooper Grain Company v. Kissinger, supra,* 385 F. Supp. at 776.

of Exemption 4 and the statutory language of § 1905. This was specifically held in *Sears, Roebuck and Co. v. General Services Admin., supra,* 402 F. Supp. at 382-3. In that case, the issue was "the standard to be applied by this Court in its review of the agency's decision" to disclose. The court stated that all parties agreed that the FOIA directed a *de novo* review where the agency's decision not to disclose was challenged. It recognized that if review were being had under the APA, the agency's decision could only be reviewed on the ground of whether it was "arbitrary and capricious." "But," it declared, "since Sears has filed a valid declaratory judgment action on whether any of the documents are exempt under the FOIA, this Court will apply the *de novo* standard mandated by the Information Act" for resolving the issue whether the information is exempt. Actually, this is substantially the same procedure approved by *Charles River Park* for proceedings in this regard under the APA, as we have seen.[78] It would be an incredible rule that a legislative prohibition such as § 1905, fixing limits on executive action for the benefit of the plaintiffs, is to be construed and applied by the executive, with only a right of review for arbitrariness on the part of those for whose benefit the statutes were enacted. This would be tantamount to committing the execution of such law to "the self-restraint of the executive branch" itself, *see*

[78] *See* 1976 *Duke L. J.* at 334, n. 18:

> "In Charles River Park 'A', Inc. v. HUD, 519 F.2d 935 (D.C.Cir. 1975), it was determined that the scope of the court's inquiry on the issue of whether the information is within an exemption should be that of de novo review."

Fleming v. Moberly Milk Products Co., supra, 160 F.2d at 265, and making the executive's *ipse dixit* final, *see Weisberg v. Department of Justice, supra,* 489 F.2d at 1202. It would be grossly unfair, as we have already said, to force the supplier of information which carries some indicia of confidentiality under both § 1905 and Exemption 4, to rely wholly on the agency. Such a ruling limiting the supplier to a challenge of arbitrariness alone against the agency's decision to disclose would be contrary to the whole thrust of the FOIA, since "because the FOIA was enacted expressly to combat administrative arbitrariness, Congress clearly did not intend to commit the disclosure decision totally to agency discretion;" and this was stated to be true in the reverse-FOIA case.[79] The supplier, if his claim to protection is as *Morton* declared a "matter of right," is entitled to a fair and adequate hearing, on proper evidence, in the courts, one that is no less broad and adequate than that given the merely curious who may seek disclosure. To repeat, when the issue is whether certain information is without a prohibition of disclosure, whether because "confidential" within both § 1905 and Exemption 4 or because of national security privilege, it is for the court itself to determine "whether the circumstances are appropriate for the claim" and not the executive department concerned and "the courts must be satisfied from all the evidence and circumstances," that the information is within or without the prohibition or privilege. This is so, because "[j]udicial control over the evidence in [such] a case cannot be

[79] 70 *Nw. U. L. R.* at 1004.

abdicated to the caprice of executive officers." *United States v. Reynolds* (1953) 345 U.S. 1, at 8-10.[80]

Nor can the defendants fault the findings of fact as made by the District Court to the effect that the information ordered not to be disclosed qualified as "confidentially" exempt under Exemption 4 and within the prohibition of § 1905. In fact, they make no assault in their briefs in this Court on the District Court's factual findings. Nor would it be easy for them to do so. It is in the record of the trial of the consolidated cases that the defendants conceded that in the earlier *Westinghouse Case* the District Court had properly determined the confidentiality issue "[o]n the evidence he had before him." And the defendants have otherwise conceded that some of the material in the reports in question was exempt from disclosure under Exemption 4 and they refused to disclose for that reason. They reaffirmed this in *Robertson v. Department of Defense* (D.C.D. 1975) 402 F. Supp. 1342, 1345, where in an action involving similar reports filed by the plaintiff General Motors, the Court stated the defendants "have taken the position that certain portions of the documents are confidential commercial or financial data which, if released, could injure GM's competitive position and are exempt from disclosure under the fourth exemption. Other portions would be disclosed were it not for the Virginia injunction. These defendants have not taken any position on the two motions presently before the Court—that of GM for summary judgment and Robertson for partial summary judgment." It is

[80] This case was cited with approval to this point in *Nixon v. United States* (1974) 418 U.S. 683, 715.

true that the District Court extended protection beyond that agreed upon by the defendants but, in so doing, the District Court was making a finding of fact, based on an *in camera* examination of the reports, and the defendants offer no reason to suggest that such a finding was erroneous on the record before the District Court. After all, the factual issue is complex and is a matter that must be left to the informed judgment of the District Court. We, therefore, find no error in the procedure followed in these cases by the District Court, or the result reached, and this would be true whether jurisdiction was being exercised under the APA or under § 1331.[81]

We accordingly affirm the grant of injunctive relief in favor of the plaintiffs and sustain the denial of declaratory relief as provided in the judgments of the District Court, for the reasons stated herein.

The decisions of the District Court in the three cases therefore are

AFFIRMED.

[81] In the Note in 1975 *Duke L.J.* at 432, n. 72, the author states:

"• • • The weakness in the *Westinghouse* and *United States Steel* opinions is in their implication that exemptions compel the withholding of all information which would qualify as exempt, regardless of a request by a private party for nondisclosure."

This statement is somewhat inexplicable, since the plaintiffs did object both administratively and by the institution of these actions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

WESTINGHOUSE ELECTRIC CORPORATION, ET AL., PLAINTIFFS, *v.* JAMES R. SCHLESINGER, ET AL., DEFENDANTS.	CIVIL ACTION No. 118-74-A

MEMORANDUM OPINION

This is an action brought by a corporation (Westinghouse) and its subsidiary (Fraser & Johnston) to prevent threatened disclosure of certain documents which those entities have filed with governmental agencies. The documents are an Employer Information Report (EEO-1) filed by a Westinghouse facility in East Pittsburg, Pennsylvania, and an Affirmative Action Program (AAP) filed by Fraser & Johnston with the Defense Supply Agency or the Office of Federal Contract Compliance (OFCC) or a Joint Reporting Committee. The EEO-1 is required to be filed by 41 CFR § 60-1.7 and the AAP is required to be developed by 41 CFR § 60-1.40. These regulations were promulgated by the Secretary of Labor pursuant to Executive Orders 11246 and 11375 and relate to the "promotion and insuring of equal opportunities for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors * * * ." 41 CFR § 60-1.1.

The Hill House Association (Hill), on October 17, 1973, requested the release of the latest EEO-1 form filed by the Westinghouse facility. Earlier the Legal Aid Society of Alameda County (Alameda) had requested release of Fraser & Johnston's 1972 AAP. The recipients of the requests in each instance notified Westinghouse and Fraser & Johnston of the requests. These companies objected to the releases and after an exchange of correspondence and meetings between the companies and the agencies, the latter determined on November 30, 1973, to release the AAP of Fraser & Johnston and on February 13, 1974, to release the EEO-1 of Westinghouse. This action was filed on March 6, 1974.

By agreement of the parties, a temporary restraining order was entered on March 8, 1974, and the case was set for hearing of the application for a preliminary injunction on March 27, 1974, the Court also advancing the trial of the action on the merits to that date and consolidating it with the hearing on the application.

The case was tried on March 27, 1974 as scheduled, Alameda and Hill having in the meantime moved to intervene as parties defendant. The other parties consented to the intervention and the intervenors participated in the trial.

Initially the defendants contest the jurisdiction of the Court. While numerous grounds of jurisdiction are asserted by the plaintiffs,[1] the Court finds that jurisdiction exists under 28 U.S.C. § 1331, the injury sought to be prevented being sufficiently alleged in the

---

[1] 5 U.S.C. §§ 702, 704; 38 U.S.C. § 1337; 38 U.S.C. § 1346; 28 U.S.C. §§ 2201-02; 28 U.S.C. § 1331.

complaint as being in excess of the requisite jurisdictional amount, and the action arising under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, under the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and under 18 U.S.C. § 1905.

The defendants also, of course, raise the defense of sovereign immunity. They say that while the action is nominally against the federal officers who head the agencies involved it is actually one against the United States. The Court concludes that the relief sought, if granted, would not "expend itself on the public treasury or domain, or interfere with the public administration" to the extent that the Government would be "stopped in its tracks." *Land* v. *Dollar,* 330 U.S. 731, 738 (1947); *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682, 704 (1949); and that the actions of the federal officers are sufficiently alleged to be beyond their statutory powers so that those actions would not be the actions of the sovereign. *Dugan* v. *Rank,* 372 U.S. 609, 621 (1963).

Plaintiffs base their claim for relief on certain exemptions from required disclosure contained in 5 U.S.C. § 552, and on 18 U.S.C. § 1905 which, although a criminal statute making unlawful certain disclosures, is invoked civilly to effectuate the congressional purpose. *Wyandotte Co.* v. *United States,* 389 U.S. 191, 202 (1967); *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964).

Insofar as the exemptions provided by the Freedom of Information Act are concerned, the Court does not base its decision on the exemption contained in 5 U.S.C. § 552(b)(3) for matters "(3) specifically exempted from disclosure by statute," although the plaintiffs' argument here does raise substantial questions. The statute they invoke as specifically prohibiting disclosure is § 709(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e). This statute created the Equal Employment Opportunity Commission, and by its terms applies only to that agency. The Joint Reporting Committee and the OFCC were created by regulations promulgated by the Secretary of Labor pursuant to Executive Order 11246, which, of course, mentions neither a Joint Reporting Committee nor an OFCC. That order purports, at least in part to effectuate the provisions of 42 U.S.C. § 2000e insofar as firms having contracts with the Government are concerned. It is therefore arguable that the ultimate authority for the Joint Reporting Committee and OFCC is 42 U.S.C. § 2000e; that they are alter egos of the EEOC; and that they should be subject to the disclosure restriction of 42 U.S.C. § 2000e-8(e).

Conciliation is the preferred policy for matters coming within the jurisdiction of the EEOC, a policy which is subverted by public disclosure. There would arguably be a circumvention of that policy if defendants were allowed, by virtue of an Executive Order grounded on § 2000e, to set up separate agencies which collected the same or similar data as the EEOC, but which were not bound by restrictions against disclosure. Weighed against this, of course, would be the policy of liberally interpreting the FOIA in favor of disclosure and consequently of narrowly interpreting statutory exemptions. However, it is not at all clear that § 2000e was the basis for Executive Order 11246. Moreover, the existence of Executive Order 10925, 1961 *U.S. Code*

Cong. & Ad. News 1274, promulgated prior to passage of § 2000e, lends support to the argument that Executive Order 11246 has a basis independent of § 2000e, being grounded instead in another statute or in an inherent power of the Executive branch to choose the terms of Government contracts. As stated, though, the decision in this case is not based on the exemptions found in § 2000e-8(e) and 5 U.S.C. § 552(b)(3), and the Court need not decide those issues.

The Court concludes, however, that the disclosure of the EEO-1 and AAP is prohibited by the exemption contained in 5 U.S.C. § 552(b)(4) for matters that are "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . ." The Court finds here, from the testimony of Professor Rutenberg, that the parts of the AAP hereafter specified and the EEO-1 contain commercial or financial information which is confidential.[2] While he had not viewed the two documents sought by the intervenors, he was in a position, from his familiarity with the regulations which prescribed the contents of the documents, to evaluate the effect of revelation of those contents. His conclusion was that with this information a competitor could deduce labor costs of the plaintiffs, the most difficult area for a competitor to learn in making strategic decisions. From this can be extrapolated a company's profit margin and resulting vulnerability to price change. Moreover, viewing the same documents over a period of time would enable a competitor to obtain a forewarning on new products

[2] See attached Appendix.

and process changes being undertaken by the plaintiffs. Comparing this testimony with the EEO-1 and AAP in question confirms the witness's conclusion. The Court relies on the testimony as well as on the nature of the material, not the mere claim of the plaintiffs, in determining that confidentiality exists. In reaching the conclusion the Court has followed the purpose of the exemption as set forth in *Bristol-Myers Company* v. *F. T. C.*, 424 F.2d 935, 938 (D. C. Cir. 1970):

> This provision serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers.

In *Sterling Drug Inc.* v. *F. T. C.*, 450 F.2d 698, 709 (D. C. Cir. 1971), the court apparently adopted the standard for coverage by the exemption which was set forth in the Senate Report on the Freedom of Information Act, namely:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes.

S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1964). The House Reports add:

> It would also include information which is confidential, since a citizen must be able to confide in

> his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1964).

18 U.S.C. § 1905, which makes it a crime for a governmental official to disclose information if "not authorized by law" to do so, also supports the relief requested by plaintiffs. It can be argued that reliance on this statute begs the question where the Government invokes it to prevent disclosure sought pursuant to FOIA. However, such is not the case where the potentially injured party invokes this statute to prevent the Government from disclosing information to a third party, for this is the precise situation dealt with by § 1905. In view of the finding of confidentiality set forth above, and the relation of the information contained in the documents to processes, operations and profit margins, the statute is clearly applicable here. Cf. *J. I. Case Co.* v. *Borak, supra.*

The defendants argue that the FOIA is authority only for *disclosing* information, not withholding it, and consequently cannot be used as a vehicle to prevent disclosure; that the exemptions are permissive only, being categories of information which *may* be exempt by an agency; and that this is a matter largely committed to agency discretion. The Court rejects this argument. It makes the statutory exemption meaningless and flies in the face of the protective purpose of the exemption as enunciated in the Senate and House Reports quoted above as well as in *Bristol-Myers Co.*

v. *F. T. C., supra.* The Court recognizes that that case, like most of the others arising under the FOIA, involved an instance where a plaintiff sought and the governmental agency contested disclosure. This does not mean, however, that a plaintiff which the exemption is designed to protect may not properly invoke that exemption where disclosure is threatened.

Insofar as being committed to agency discretion is concerned, the disclosure portion of the regulations itself recognizes an exemption of confidential information, with and without reference to the FOIA. 41 CFR § 60-40.3. The FOIA cannot permit agency discretion to the extent that such discretion precludes *de novo* determination by a court of the entitlement to an exemption under FOIA.

Plaintiffs also contend that the materials in question are "investigatory files" within the meaning of 5 U.S.C. § 552(b)(7). However, the purpose of that exemption is only "to prevent premature discovery by a defendant in an enforcement proceeding," *Wellford* v. *Hardin*, 444 F.2d 21, 23 (4th Cir. 1971), and it is inapplicable to the facts of this case.

Nor does the Court conclude that the defendants are bound by language of confidentiality which plaintiffs read into the receipts for the AAPs signed by the Contract Compliance Officers. These seem no more than an attempt by plaintiffs to assert their ownership of the documents, an attempt pursued at trial. The ownership of the documents, however, is not determinative of the outcome of this case.

In view of the foregoing, reviewability of the agencies' action under the Administrative Procedure

Act, 5 U.S.C. § 701, *et seq.*, and whether that action can stand under the standard of review of the Act need not be considered.

The Court accordingly concludes that that part of the EEO-1 (Exhibit A) filed by Westinghouse which is under the heading "Section D—EMPLOYMENT DATA" may not be disclosed and that only that part of the AAP (Exhibit C) which appears in Exhibit B may be disclosed.

Plaintiffs have requested a declaratory judgment that disclosure of *any* EEO-1 reports or AAPS of plaintiffs is prohibited. This is further relief than the Court feels is warranted. The Court holds no more here than that certain portions of two specific documents which the Court has had the opportunity to examine must not be disclosed. The requested declaratory relief would necessarily cover information yet to be prepared which may or may not be confidential in nature.

A decree enjoining defendants from disclosure other than in accordance with the foregoing should be prepared by counsel for the plaintiffs and presented for entry after submission to counsel for defendants and intervenors for approval as to form.

ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
April 2nd, 1974

"BY MR. DRIVER:

Q. Dr. Rutenberg, in referring to the EEO1 report, if you would look at it, please, sir, and from the breakdown of that report are you able in your area of knowledge to come up with opinions as to the work force and corporate vulnerability of a company?

A. Definitely, yes.

Q. All right.

A. With this information, this is the most—the area of information is the most difficult to get in making strategic decisions. This is the area of the cost, the variable cost, which is primarily employee cost broken down in a lot of detail. There are nine categories here.

Q. All right, sir. With that information, what might you in corporate planning or strategic deduce about a company's competitive position?

A. Okay. From this information I can—with this information, knowing where the facility is, I can get the wage rates from competitive indices, from employment services and so on.

From this I can infer the labor cost of the facility. Knowing the labor cost—the cost of the product is based on the labor cost plus the material cost. If I know that, and the material cost is gettable by what is called volume analysis and purchasing and engineering design. If I know those two components, I then know the facility's profit margin. I can get that information fairly readily.

With the material in the affirmative action program,

I have such detail I can get a very precise fix on the variable manufacturing cost per unit, and from this the profit margin per unit of this facility.

If I am a competitor, I can then think through the effect—and particularly if I am a dominant competitor—I can think through the effect of a price change on the existence of this facility. This is a competitive vulnerability of this facility to a price change.

Q. Take, for example, over a period of years, if you have had three or four such documents and you start either a reduction or an increase in a certain employee's category and you could pick one based on that form, tell the Court what that might indicate to you.

A. Let's consider the question of professionals. In the affirmative action program, this is broken down into a lot of categories.

One that I was looking at has 23 categories. Another has about 18.

If I can watch the number of senior design engineers through time, and I can watch this buildup, I can then get a very good clue that it is very likely that this facility, they are developing new products or new processes—I don't know which at this time.

If I watch a number of maintenance workers, then I can get a very good idea, broken down, again, in fine detail, in the affirmative action program, I can get a good idea whether it is a new process they are working on or new product development, and from this I can get a good forewarning as to what a competitor, what moves a competitor will be making.

If I am not engaged in similar kinds of research, I can immediately start doing so, and this is a fairly

common practice, to have—in essence, strive for some forewarning of a competitor's process, of a competitor's product.

If I can get that kind of information, I can embark on my own catch-up research, and it is relatively easy; why, because it is possible to hire, to job interview from the competitor, to hire a few people, to canvass suppliers, to try to get a clue to what it is exactly that they are buying that is unusual from their previous buying patterns, and in this way my catch-up research may even be cheaper than the first person's research."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES STEEL CORPORATION, PLAINTIFF *v.* JAMES R. SCHLESINGER, *Secretary, etc. et al.*, DEFENDANTS	Civil Action No. 183-74-A
GENERAL MOTORS CORPORATION, PLAINTIFF *v.* JAMES R. SCHLESINGER, *Secretary, etc., et al.*, DEFENDANTS	Civil Action No. 195-74-A

MEMORANDUM OPINION

The law and facts here presented are identical for all practical purposes with those presented to Judge Albert V. Bryan, Jr. in Westinghouse Electric Corporation, et al. versus James A. Schlesinger, et al., Civil Action No. 118-74-A, this court.

Had the undersigned known that Judge Bryan had Westinghouse under consideration, he would not have heard these cases—The judges of this division rarely

hear a case involving the same issues of law and fact just heard and determined by the other resident judge.

Fortunately no harm has resulted from my hearing and determining these cases—Although I did not read Judge Bryan's opinion in Westinghouse until after I had heard the testimony and argument of counsel in these cases, I am pleased to announce that we have reached the same conclusion. Judge Bryan's memorandum opinion in Westinghouse is adopted in toto and made a part hereof by reference.

Section 552(b)(4) of the Freedom of Information Act specifically exempts from disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential.

This Court finds from the evidence presented that the AAPs and EEO-1s in question contained confidential commercial or financial information which would not customarily be released to the public by the corporate plaintiffs, and that such information would be of substantial value to the plaintiff's competitors in performing cost-pricing analyses of plaintiffs' pricing practices, in monitoring plaintiffs' development of new products and processes, in identifying plaintiffs' customers in their consumption needs, in analyzing plaintiffs' production by product line, and in developing competitive bidding strategies to be used against the plaintiffs; and that disclosure of this information would both impair the Government's ability to obtain necessary information for its administration of the Executive Orders and Title 7 of the Civil Rights Act and would cause substantial harm to the competitive position of the plaintiffs.

The Government tacitly concedes that some of the information in the plaintiffs' AAPs and EEO-1 is not disclosable because they have agreed to delete the names of any particular employees—all wage data or salary rates—any promotion analyses which tend to identify an individual employee—any projections of hiring or lay-off rates which indicate substantial changes in business patterns—and any and all reasons for termination which tend to identify individual employees.

They say, however, that the designated government administrative officer has the sole responsibility under the Freedom of Information Act of determining whether the requested documents—AAPs and EEO-1s or any portions thereof—are disclosable; that Court review, if any, is limited to review for abuse of discretion.

The courts not the Executive Branch have the last word in such matters. See United States v. Nixon, etc., No. 73-1766 (July 24, 1974), —— U.S. ——.

The Government further says that the FOIA exemptions are neither mandatory nor available to the plaintiffs in opposing disclosure—Only the Government may use the exemptions to justify nondisclosure—They cite no authorities to support these contentions. This argument is without merit.

Although the FOIA makes disclosure the rule and secrecy the exception, the Fourth Circuit has long recognized the specific exemptions mentioned therein. See Sears versus Gottschalk, Commissioner of Patents, No. 73-1699, decided August 14, 1974, and the cases cited therein on page fifteen.

Upon the record here made, this Court holds that the

§ 552(b)(4) exemption of the Freedom of Information Act bars disclosure of the confidential commercial or financial information contained in the plaintiffs' AAPs and EEO-1s by the Defense Supply Agency or any other branch of the United States government without the consent of the plaintiffs first had and obtained.

If the parties cannot agree amongst themselves which portions of the documents in question are non-disclosable under the findings here made, each should submit to the Court within the next thirty days a copy of the AAPs and EEO-1s so marked—The Court will then determine which portions, if any, of the said documents may be disclosed.

In the interim the Government may not release any of the requested information.

The requested declaratory relief covering all past and future AAPs and EEO-1s is not warranted—It will be denied.

The Clerk will send a copy of this memorandum opinion to all counsel of record.

OREN R. LEWIS
United States Senior Judge

September 20, 1974

A True Copy: Teste:
W. Farley Powers, Jr., Clerk
By Doris R. Casey
Deputy Clerk

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1801

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

versus

JAMES R. SCHLESINGER, SECRETARY, U. S. DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR,

APPELLANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA COUNTY, AND COUNCIL ON ECONOMIC PRIORITIES,

INTERVENOR-DEFENDANTS.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

William K. Slate, II
Clerk

FILED
SEP. 30, 1976

U. S. Court of Appeals
Fourth Circuit

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2048

WESTINGHOUSE ELECTRIC CORP. AND ITS SUBSIDIARY, FRASER & JOHNSTON COMPANY, APPELLEES,

—versus—

JAMES R. SCHLESINGER, U. S. DEPARTMENT OF DEFENSE; WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIES, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, APPELLANTS,

CONCERNED WORKERS, ROBERT WOOLEY, LEGAL AID SOCIETY OF ALAMEDA CO., COUNCIL ON ECONOMIC PRIORITIES, DEFENDANT-INTERVENORS.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

William K. Slate, II
Clerk

FILED
SEP. 30, 1976

U. S. Court of Appeals
Fourth Circuit

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1269

UNITED STATES STEEL CORPORATION, APPELLEE,

—versus—

JAMES R. SCHLESINGER, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

APPELLANTS,

NATIONAL ORGANIZATION FOR WOMEN AND CONSUMER FEDERATION OF AMERICA,

AMICUS CURIAE.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED
SEP. 30, 1976

U. S. Court of Appeals
Fourth Circuit

William K. Slate, II
Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1271

GENERAL MOTORS CORPORATION,

APPELLEE,

—versus—

JAMES R. SCHLESINGER, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; LT. GEN. WALLACE ROBINSON, DIRECTOR, DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; AND PETER J. BRENNAN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

APPELLANTS.

NATIONAL ORGANIZATION FOR WOMEN AND CONSUMER FEDERATION OF AMERICA,

AMICUS CURIAE.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED
SEP. 30, 1976

U. S. Court of Appeals
Fourth Circuit

William K. Slate, II
Clerk

APPENDIX E

STATUTES AND REGULATIONS

The Freedom of Information Act, 5 U.S.C. 552, as amended by Pub. L. 93-502, 88 Stat. 1562, and Pub. L. 94-409, 90 Stat. 1247, provides in pertinent part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *

* * * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether

such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld * * *;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * *

18 U.S.C. 1905 provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person,

firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The OFCC disclosure regulations, 41 C.F.R. Part 60-40, provide in pertinent part:

Subpart A—General

§ 60-40.1 Purpose and scope.

This part contains the general rules of the OFCC providing for public access to information from records of the OFCC or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places at which and the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCC and the compliance agencies.

§ 60-40.2 Information available on request.

(a) Upon the request of any person for identifiable

records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

§ 60-10.3 Information exempt from compulsory disclosure and which may be withheld.

(a) The following documents or parts thereof are

exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) These portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) These portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject the named compliance officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related docu-

ments, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, interagency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCC.

§ 60-40.4 Information disclosure of which is prohibited by law.

The Standard Form 109 (EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instructions from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709(e)

of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

☆ U.S. Government Printing Office: 1977—229-490/64

No. 76-1192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

HAROLD BROWN, Secretary of Defense, ET AL.,
Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN SUPPORT OF THE PETITION AND IN OPPOSITION TO THE MOTION OF THE AMICUS CURIAE

BURT A. BRAVERMAN
FRANCES J. CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006

S. G. CLARK, JR.
600 Grant Street
Pittsburgh, Pennsylvania 15230

Attorneys for Respondent United States Steel Corporation

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1192

HAROLD BROWN, Secretary of Defense, ET AL.,
Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN SUPPORT OF THE PETITION AND IN OPPOSITION TO THE MOTION OF THE AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1905 is a statute which specifically exempts matters from disclosure within the meaning of Exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3).

2. Whether agency regulations promulgated for the express purpose of implementing the Freedom of In-

formation Act, 5 U.S.C. § 552, constitute "authorization by law" within the meaning of 18 U.S.C. § 1905 for disclosure of private, confidential information.

3. Whether Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), is an absolute bar to disclosure of private, confidential information which falls within that exemption.

4. Whether a government agency may disclose private, confidential information if the information is exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and if disclosure of the information would violate 18 U.S.C. § 1905.

5. Whether a person who has supplied to a government agency private, confidential information which assertedly is exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), or whose disclosure assertedly would violate 18 U.S.C. § 1905 is entitled to a trial *de novo* in a suit to prevent disclosure by the Government of that information.

REASONS FOR GRANTING THE PETITION

Petitioners accurately state that these cases are representative of a rapidly growing number of "reverse FOIA" actions which have been brought by private parties to enjoin federal government agencies from disclosing, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, confidential information which those parties have submitted to the Government. Petitioners also correctly state that such cases raise important questions concerning the purpose

and nature of the Freedom of Information Act and the Act's exemptions, as well as the extent to which private, confidential information should be protected from public disclosure.[1]

Petitioners have, however, declined to raise a fundamental issue which this Court should consider concerning Exemption 3 of the FOIA. Moreover, in presenting questions for this Court's review Petitioners have not, Respondent believes, adequately framed those questions.

Accordingly, because of the universal agreement as to the importance of these cases and the need for decisive guidance from this Court,[2] Respondent joins in

---

[1] The issues presented by these cases are of broad public significance since they affect the disclosability not only of employment information provided to the Government by tens of thousands of government contractors such as Respondents, but also of an endless array of other materials of a confidential and proprietary nature which private parties are asked or compelled to submit to the Federal Government. Those materials, although long maintained in well deserved confidence by the Government, now are, under the construction of the FOIA urged by Petitioners here, threatened to be disclosed to anyone from the well intentioned member of the public to the unscrupulous competitor. Such disclosure portends serious adverse consequences not only to the persons who have furnished the information to the Government, but also to the Government itself whose ability to acquire information from the private sector for implementation of regulatory programs will be impaired if the confidentiality with which the information was initially submitted is not respected.

[2] A number of Circuit Courts are presently awaiting guidance from this Court in order to dispose of pending "reverse FOIA" appeals. In *Hughes Aircraft Co.* v. *Schlesinger*, No. 75-1064 (9th Cir.), the Ninth Circuit has, after oral argument, withdrawn the case from submission pending action by this Court in the instant cases. Similarly, *Chrysler Corp.* v. *Schlesinger*, Nos. 76-1970 and 76-2238 (3d Cir.), has been removed without explanation from the court's argument calendar, presumably to await the

urging that the Court grant the petition for writ of *certiorari*. However, for the reasons stated below, Respondent urges the Court to consider the additional, and reframed, questions presented in this brief.

1. The court of appeals held that 18 U.S.C. § 1905 specifically exempts matters from disclosure within the meaning of Exemption 3 of the FOIA and that, because disclosure of Respondents' documents would violate § 1905,[3] those documents were both exempt from mandatory disclosure under the FOIA and nondisclosable under § 1905. Pet. App. 14a, 26a. In addition, the court of appeals held that, although "disclosure of . . . exempt information is ordinarily discretionary with the agency * * * the exercise of this discretionary power is subject to the restraints imposed by other 'statutes, rules, and regulations' and to any clear declarations of a legislative policy against disclosure as reflected in an exemption of the [Freedom of Information] Act itself";[4] and that Exemption 4 of the FOIA constitutes one such declaration of legislative policy which "confers on a supplier of *private,* confidential commercial information an absolute right to prevent the disclosure of information which falls within Exemption 4." Pet. App. 44a, 41a-42a (emphasis in original).[5]

---

outcome of these cases. And in *Sears, Roebuck and Co.* v. *GSA*, — F.2d — (D.C.Cir., April 1, 1977), Slip Op. at 13, the D.C. Circuit has expressly noted the absence of, and need for, "decisive new guidance by the Supreme Court" on some of the very questions raised by Respondent herein.

[3] Petitioners have not challenged the court's finding (Pet. App. 56a) that Respondents' documents consisted of the type of information described in 18 U.S.C. § 1905.

[4] Pet. App. 12a (footnote omitted).

[5] The texts of Exemptions 3 and 4, and 18 U.S.C. § 1905 are set forth at Pet. App. 82a-83a.

Petitioners have expressly declined to seek review of the court of appeals' holding that 18 U.S.C. § 1905 is an Exemption 3 statute. Pet. 16 n. 20. Instead, Petitioners have sought review of the decision below on the grounds, *inter alia,* (1) that, contrary to the court of appeals' decision, government agencies have discretion to disclose information falling within Exemption 4; and (2) that, even though Respondents' documents fall within 18 U.S.C. § 1905, disclosure of those documents does not violate that statute because it is "authorized by law" within the meaning of § 1905 by agency disclosure regulations.

Respondent believes that Petitioners, in declining to seek review of the question whether 18 U.S.C. § 1905 is an Exemption 3 statute, have overlooked the fundamental issue in this case. As the court below noted, there was subsequent to the passage of the FOIA

> "considerable contrariety in the decisions of the District and Circuit Courts on the statutes [including 18 U.S.C. § 1905] properly within the scope of Exemption 3. * * * However, in a consistent lines of cases, beginning with *Grumman Aircraft Engineer. Corp.* v. *Renegotiation Bd.* (1970), 138 U.S. App. D.C. 147, 425 F.2d 578, 580, n. 5, and continuing up to *Charles River Park "A", Inc.* v. *Department of H. & U.D.* (1975), 171 U.S. App. D.C. 286, 519 F.2d 935, 941, n. 7, the District and Circuit Courts of the District of Columbia have held that § 1905 is not among the statutes referred to in § 552(b)(3)." Pet. App. 17a-18a.

Subsequent to the D.C. Circuit's decision in *Charles River Park,* this Court decided *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975). There, the Court held that it was not the intent of Congress in enacting the FOIA to repeal or amend in any way statutes then

"extant" which restrained federal agencies from publicly disclosing information in their files. *Id.* at 263-6. This Court broadly construed Exemption 3 to apply not only to statutes which restricted access to named documents but also to statutes which generally directed government agencies to withhold information. *Id.* at 265-6. In doing so, the Court expressly rejected the construction which previously had been given to Exemption 3 by the D.C. Circuit. Moreover, although *Robertson* did not specifically identify 18 U.S.C. § 1905 as a statute comprehended by Exemption 3, the court of appeals below concluded that "[t]here can be little doubt that § 1905 was among those . . . [statutes] intended to be covered by Exemption 3, to which the Congress and the Court in *Robertson* referred." Pet. App. 24a.[6]

In response to this Court's *Robertson* decision (and prior to the decision of the court below), Congress amended Exemption 3 for the purpose of overruling[7] the precise result reached in *Robertson* insofar as it construed Exemption 3 to comprehend preexisting nondisclosure statutes, such as the FAA statute at issue in *Robertson*, which either (1) failed to establish specific criteria for withholding or (2) committed the decision to withhold to agency discretion. P.L. 94-409, 90 Stat. 1241 (Sept. 13, 1976), § 5(b). The amendment

[6] *See* 1958 Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. 921, 85th Cong., 2d Sess. 985-987; and *see* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June, 1967, at pp. 31-32, which lists § 1905 as one of the most important statutes which Congress intended to preserve under Exemption 3.

[7] Report of the House Committee on Government Operations, H.R.Rep.No. 94-880, 94th Cong., 2d Sess. 23 (1976).

to Exemption 3, however, did not purport to affect other preexisting nondisclosure statutes which met the requirements of particularity contained in amended Exemption 3.[8]

Subsequent to *Robertson* and the amendment to Exemption 3, the court below issued its decision holding that 18 U.S.C. § 1905 *was*, in fact, a statute comprehended by Exemption 3. The court of appeals was of the opinion that this Court's holding in *Robertson*, apparently notwithstanding the subsequent amendment to Exemption 3, compelled the conclusion that 18 U.S.C. § 1905 was an Exemption 3 statute. Then, only two weeks later, in the final link of this chain of events, the D.C. Circuit, in *National Parks and Conservation Assoc.* v. *Kleppe*, 547 F.2d 673 (1976), reaffirmed its view that 18 U.S.C. § 1905 *was not* an Exemption 3 statute. *See Sears, Roebuck and Co.* v. *GSA, supra*, Slip Op. at 11.

The holding of the court below is thus directly contrary to the decisions of the D.C. Circuit on this issue, as even the D.C. Circuit itself has recognized,[9] and presents a clear conflict of decisions among the circuit courts which warrants review by this Court. See Rule 19(b) of the Rules of the Supreme Court; *Arco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 559 (1968). Moreover,

[8] Amended Exemption 3 provides that the FOIA disclosure mandate shall not apply to matters which are "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . ."

[9] *Sears, Roebuck and Co.* v. *GSA, supra*, Slip. Op. at 11.

this Court's construction of Exemption 3 in *Robertson* is sorely in need of clarification in light of Congress' amendment of that exemption. Finally, resolution of this conflict is fundamental to reverse FOIA cases involving assertedly confidential private information. For if, as Respondent submits, the court of appeals was correct in holding that 18 U.S.C. § 1905 is an Exemption 3 statute, it would be unnecessary for this Court to decide whether Exemption 4 of the FOIA is an absolute bar to disclosure; the Court would reach that question only if it found that § 1905 was not an Exemption 3 statute. The desirability of reviewing the Exemption 3 question first has been expressly noted by the D. C. Circuit in *Sears, Roebuck and Co.* v. *GSA, supra*, where that court stated that, preliminary to a review of information's status under Exemption 4, "the threshold issue now is whether § 1905 is within the now more limited group of statutes described by Exemption 3." Slip Op at. 13.

Accordingly, Respondent submits that the "threshold issue" for review by this Court, should it grant the petition, is whether 18 U.S.C. § 1905 is an Exemption 3 statute.[10]

2. Should the Court conclude that § 1905 is an Exemption 3 statute it will also be necessary for the Court to consider the correlative question of whether

[10] In this context, the Court should also provide guidance as to whether 18 U.S.C. § 1905 is, as stated by the court below (Pet. App. 27a n. 38) and in *Charles River Park* (519 F.2d at 941-2 n.7), merely "coextensive with Exemption 4; or whether, as recently suggested by the D.C. Circuit in *Sears, Roebuck and Co.* v. *GSA*, *supra*, Slip Op. at 13, § 1905 may provide broader protection from disclosure than is presently available under Exemption 4 as that exemption has been construed in *National Parks and Conservation Assn.* v. *Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974).

agency regulations promulgated for the express purpose of implementing the FOIA constitute "authorization by law", within the meaning of 18 U.S.C. § 1905, for the disclosure of confidential information.[11] If, as Respondent submits, such agency regulations do not constitute authorization by law for disclosure within the meaning of §1905,[12] then Respondents' documents would be both exempt from mandatory disclosure under Exemption 3 and nondisclosable under § 1905, as the court of appeals correctly held. Pet. App. 14a, 26a.

3. Should, however, the Court find that 18 U.S.C. § 1905 is *not* an Exemption 3 statute or that Petitioners' disclosure regulations *do* constitute "authorization by law" within the meaning of 18 U.S.C. § 1905 for disclosure of Respondents' confidential information,[13] the Court should then consider whether, as the court of appeals below correctly held, Exemption 4 of

[11] This question, although framed somewhat differently, is presented by Petitioners.

[12] *See Charles River Park* v. *HUD, supra*, 519 F.2d at 942-3. Since Petitioners' disclosure regulations were promulgated for the express purpose of implementing the FOIA, those regulations cannot limit the applicability of a "preexisting nondisclosure" statute such as 18 U.S.C. § 1905 when Congress and this Court in *Robertson* have said that not even the FOIA itself may have that effect. 422 U.S. 263-5.

[13] In any event, the disclosure regulations relied upon by Petitioners (41 C.F.R. Part 60-40) could not authorize disclosure because (1) those regulations, to the extent that they are applied to authorize disclosure of documents which fall within 18 U.S.C. § 1905, conflict with 29 C.F.R. § 70.21 ("by which . . . [Petitioners] admitted they were bound", Pet. App. 25a) and are therefore void and unenforceable under 29 C.F.R. § 70.71 (see Appendix, *infra*); and (2) disclosure would in fact violate 41 C.F.R. § 60-40.3(a)(2) (Pet. App. 85a; *see* Pet. App. 7a, 9a-10a, 56a).

the FOIA constitutes an absolute bar to disclosure of *private*, confidential information which falls within the exemption.[14] Here, too, the decision of the court below conflicts with the Fifth Circuit's decision in *Pennzoil Co.* v. *FPC*, 534 F.2d 627, 630 (1976), and, at least in form if not in substance, with the D.C. Circuit's decision in *Charles River Park, supra*, 519 F.2d at 941,[15] both of which held that, absent other restraints, a government agency has discretion to disclose information which falls within Exemption 4. This issue therefore warrants review by this Court.

In this context, the Court ought to consider whether Congress, although it intended that disclosure of *agency* documents which fall within the FOIA exemptions would ordinarily be discretionary, intended to accord greater protection to *private* confidential commercial information which *private* persons or corporations furnish to the Government, the disclosure of which would be harmful to *private* interests. Respondent submits that, only by recognizing the distinction drawn by Congress between *private* and *agency*

[14] See n. 11, *supra*. Petitioners have not challenged the court of appeals' finding that Respondents' documents fell within Exemption 4 (Pet. App. 56a).

[15] Although the D.C. Circuit has not expressly held that information which falls within Exemption 4 may never be disclosed, that is the implication of its decision in *Charles River Park "A", Inc.* v. *HUD, supra*. There the D.C. Circuit stated that it construed Exemption 4 and § 1905 to be "coextensive"; that is, privately supplied confidential information which falls within Exemption 4 also falls within 18 U.S.C. § 1905. Because the disclosure of such information would violate § 1905 and would, therefore, be an abuse of discretion, under *Charles River Park* no private confidential information which falls within Exemption 4 may be disclosed.

records, can the FOIA's basic disclosure policy *and* the equally important congressional policy underlying the exemptions *both* be given their intended effect. The court below, in contrast to the decisions of the D.C. Circuit, correctly drew this distinction in holding that, regardless of the Government's discretion to disclose *agency* documents, the Government has no discretion to disclose *private* documents which fall within Exemption 4. Pet. App. 41a-52a.

4. In the event this Court decides both that 18 U.S.C. § 1905 is not an Exemption 3 statute and that Exemption 4 does not stand as an absolute bar to disclosure of material which falls within the exemption, the Court should declare whether the Government is, nevertheless, prohibited from disclosing information which falls within Exemption 4 of the FOIA *and* whose disclosure would violate 18 U.S.C. § 1905. This approach has been employed by the courts of the District of Columbia Circuit [16] and was acknowledged, if not expressly employed, by the court below.[17]

5. Finally, Respondent submits that the Court need not consider the second question presented for review by Petitioners: whether judicial review in a reverse FOIA action is limited to review of the administrative record for abuse of discretion. Respondent submits

[16] *E.g., Charles River Park "A", Inc.* v. *HUD, supra*, 519 F.2d at 941-2. See also, *e.g., Chrysler Corp.* v. *Schlesinger*, 412 F.Supp. 171 (D.Del. 1976), *appeal pending*, Nos. 76-1970 and 76-2238 (3rd Cir.)

[17] Although the court of appeals stated that Exemption 4, standing alone, is an absolute bar to disclosure of materials which fall within the exemption, the court, earlier in its opinion, observed that Exemption 4 and 18 U.S.C. § 1905 are "coextensive" and that "material qualifying for exemption under (b)(4) falls within the material, disclosure of which is prohibited by § 1905." Pet. App. 27a n. 38.

that this question is insubstantial for the reasons set forth by the court below (Pet. App. 53a-56a) and by the D.C. Circuit in *Charles River Park "A", Inc.* v. *HUD, supra,* 519 F.2d at 940-1 n. 4,[18] and *Sears, Roebuck and Co.* v. *GSA, supra,* Slip Op. at 4-5; and in light of the fact that no court in the numerous reverse FOIA actions which have to date been brought under Exemption 4 and 18 U.S.C. § 1905 to enjoin disclosure has denied the reverse FOIA plaintiff *de novo* review of its claims.

For the foregoing reasons, Respondent supports the petition for writ of *certiorari* but urges the Court to consider the additional, and reframed, questions set forth by Respondent.

REASONS FOR DENYING AMICUS' REQUEST THAT THIS COURT CONSIDER AN ADDITIONAL QUESTION

Amicus asks this Court to grant *certiorari* on an issue not raised by Petitioners: whether persons who have requested documents pursuant to the FOIA must be joined, pursuant to Rule 19, F.R.Civ.P., as indispensable parties in reverse FOIA cases. *Amicus'* request should be denied.

1. Regardless of the merits of *Amicus'* argument, its request is untimely. The joinder issue should have been raised by *Amicus* at the district court level in the *General Motors* case, either through intervention or, if that method was unacceptable for the reasons stated by *Amicus* (*Amicus'* Brief 12 n. 5), as *amicus curiae.* Failing that, at the very least, the issue should have

[18] "[T]he district court is *not reviewing agency action;* it is making a *threshold determination* whether the plaintiff has any cause of action at all [under either the FOIA or 18 U.S.C. § 1905]." (Emphasis added).

been raised by *Amicus* in the court of appeals as *amicus curiae.* Had *Amicus* followed that orderly procedure, one or both of the lower courts would have passed upon the issue, thereby giving this Court the benefit of their review of the facts and analysis of the legal issues. By delaying, *Amicus* has deprived the Court of that record.

Furthermore, there is a case presently pending in the D.C. Circuit Court of Appeals in which the issue of Rule 19 joinder has been *timely* raised and which would therefore provide a more suitable vehicle than the instant case for review of the joinder issue. In that case, *Consumers Union* v. *Consumer Product Safety Council,* 400 F.Supp. 848 (D.D.C. 1975), *appeal pending,* No. 75-2059 (D.C.Cir.) (argued Sept. 21, 1976), the issue of Rule 19 joinder has been raised both with respect to joinder of the supplier of the documents as a necessary party in an action brought by the requester to compel disclosure; and with respect to joinder of the requester as a necessary party in the related reverse FOIA action brought by the supplier of the documents. In contrast to the instant case, by the time *Consumers Union* comes to this Court on petition for writ of *certiorari,* the issue of Rule 19 joinder will be ripe for decision, having been thoroughly considered below.

2. The question presented by *Amicus* need not be considered becaus it is insubstantial. For, under the criteria of Rule 19, the requester is not an indispensable party to a reverse FOIA suit.

Failure to join the requester does not "as a practical matter impair or impede his ability" (F.R.Civ.P. 19 (a)(2)(i)) to seek to compel release of the documents in question. If the reverse FOIA suit results in an

order requiring disclosure of the documents sought, the requester's interest is fully satisfied. If the suit results in an order to withhold, the requester, since he was not a party to the original suit, will not be collaterally estopped from bringing a new action in his own name to compel production of the documents. *See Provident Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 114, 122 (1968).

Nor does a failure to join the requester mean that those persons already parties will be exposed "to a *substantial* risk" of incurring inconsistent obligations. F.R.Civ.P. 19(a)(2)(ii) (emphasis added). Such a result can occur only if the document supplier successfully concludes a suit to enjoin disclosure, if the requester successfully concludes a suit to compel disclosure, and if those suits are brought in different jurisdictions. This situation has not yet arisen in this case or any other known to counsel and is indeed highly unlikely. Accordingly, Respondent submits that failure to join the requester simply does not create a "substantial" risk of inconsistent obligations within the meaning of Rule 19.

Even if there is a risk that the Government may be subjected to inconsistent obligations as a result of the requester's interest in the documents, this alone does not make the requester an indispensable party. *See* Adv. Committee Comments to Rule 19, 39 FRD 89, 92-93 (1966). Before a person needed for just adjudication can be regarded as an indispensable party, the court must determine that "in equity and good conscience" the action *cannot* proceed in that person's absence. F.R.Civ.P. 19(b). In a reverse FOIA suit, there is no insuperable obstacle to an adjudication without the requesting party for, legally and factually,

the requester's participation will add nothing to the case.[19] Consequently, even without the requster, a court is in a position to afford complete relief among those who are already parties.

3. Finally, it is unnecessary for the Court to consider whether the requester should always be joined under Rule 19 because, in a reverse FOIA action, the requester may intervene pursuant to Rule 24.

Rule 24 allows the requester to decide for himself whether he will participate. This is important in the context of reverse FOIA suits, for routine joinder will not be of significant benefit, and may even be a burden, to the majority of persons who find that their FOIA document requests have precipitated reverse FOIA actions. Many, if not most, requesters have no desire to incur the expenses involved in defending the reverse FOIA suit, and prefer to rely upon the Government to represent their interests. For those who prefer to actively participate in the reverse FOIA suit, no one could seriously challenge their right as an interested party to intervene under Rule 24. Thus, Rule 24 avoids the problem, inevitable if the requester is routinely joined under Rule 19, of bringing before the court parties who have no wish to participate in the litigation and little or nothing to contribute to the disposition of the case.

Rule 24 also avoids the unfair and improper restriction of the reverse FOIA plaintiff's choice of venue

---

[19] Disclosure does not depend in any way upon the motive, interest or identity of the requester, since the FOIA requires that information be made available to "any person" unless it is exempt. 5 U.S.C. § 552(a)(3); *see Benson* v. *GSA,* 289 F.Supp. 590, 593 (W.D.Wash. 1968), *aff'd,* 415 F.2d 878 (9th Cir. 1969).

which will result if this Court rules that the requester must be routinely joined under Rule 19.[20] For, if an indispensable party (i.e., the requester) is not subject to the jurisdiction of the court in which the reverse FOIA plaintiff has brought his action, the court in which the action is pending *must* dismiss the case, forcing the reverse FOIA plaintiff to refile his action in a jurisdiction where personal service is available over the requester, and thereby restricting the reverse FOIA plaintiff's broad freedom of choice of venue under 28 U.S.C. § 1391.[21] This result would not generally arise under Rule 24 since a requester intervening

---

[20] *Amicus* admits that he intends to bring about this restriction upon the reverse FOIA plaintiff's choice of venue. *Amicus'* Brief 12 n. 5. By seeking Rule 19 joinder, *Amicus* does not simply seek to bring all parties before a single forum, a result within the contemplation of Rule 19, but rather to bring all parties into a forum of *his own choice,* a result not in accordance with the interest of the rule.

[21] This restriction on the reverse FOIA plaintiff's choice of venue violates 28 U.S.C. § 1391(e), which provides that venue under that subsection may be restricted only "as otherwise provided by law." The Federal Rules are not a provision of law within the meaning of the statute. *See* F.R.Civ.P. 82.

If this broad choice of venue is to be restricted and if requesters as a class require special protection in the context of reverse FOIA actions, it is appropriate for Congress, rather than the courts, to act. Congress has shown its concern and ability to deal with the procedural side of FOIA enforcement by providing to the document requester a wide choice of venue under 5 U.S.C. § 552(a)(4)(B) in suits to compel disclosure; if deemed warranted, Congress could enact similar express provisions for venue and joinder in reverse FOIA cases. But, as presently drafted, nothing in the FOIA suggests that Congress intended the wide choice of venue provided to requesters in suits to compel disclosure to result in a restricted choice of venue for the supplier of documents in a reverse FOIA action. *See Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 19-20 (1974).

under that rule cannot force this change of venue upon the original plaintiff.[22]

Accordingly, *Amicus'* request should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

BURT A. BRAVERMAN
FRANCES J. CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C. 20006

S. G. CLARK, JR.
600 Grant Street
Pittsburgh Pennsylvania 15230

Attorneys for Respondent
United States Steel Corporation

---

[22] If there were a real inconvenience in the original plaintiff's choice of forum, the requester could move for a change of venue under 28 U.S.C. § 1404. The disposition of a motion under § 1404 is discretionary, and a court may take into account all relevant factors in ruling upon it, *Southern Ry. Co.* v. *Madden,* 235 F.2d 198 (4th Cir.), *cert. den.*, 352 U.S. 953 (1956), including those which, according to *Amicus,* make it appropriate to give the requester a voice in the choice of forum.

APPENDIX

The Regulations of the Department of Labor, 29 C.F.R. Part 70, provide in pertinent part:

§ 70.21 Records Not Disclosable.

(a) Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law.

* * *

§ 70.71 Authority of Agency Officials in Department of Labor.

Each agency of the Department of Labor for which an officer or officers have authority to issue rules and regulations may through such officers promulgate supplementary regulations, not inconsistent with this part, governing the disclosure of particular or specific records which are in the custody of that departmental unit. Agencies of the Department which do not or have not promulgated special supplementary regulations governing disclosure of particular records shall disclose such records pursuant only to the provision of Subparts A and B of this Part 70.

In The

Supreme Court of the United States

October Term, 1976

No. 76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND GENERAL MOTORS CORPORATION IN OPPOSITION

CHARLES F. VANCE, JR.
GUY F. DRIVER, JR.
FRANCIS C. CLARK
2400 Wachovia Building
P.O. Drawer 84
Winston-Salem, North Carolina 27102

EUGENE L. HARTWIG
General Motors Corporation
General Motors Building
Detroit, Michigan 48202

STUART SALTMAN
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

Attorneys for Respondents, Westinghouse Electric Corporation and General Motors Corporation

10679A

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

APPENDIX

In The

Supreme Court of the United States

October Term, 1976

No. 76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND GENERAL MOTORS CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinions below are properly listed in and appended to the petition.

JURISDICTION

The petitioners'[1] statement of jurisdiction is correct. The

1. The petitioners are the Secretary of Defense, the Director of the Defense Supply Agency, the Director of the Office of Federal Contract Compliance Programs and the Secretary of Labor.

petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit was filed on February 28, 1977 and received by counsel for the respondents[2] on March 4, 1977. On March 23, 1977 the Clerk extended the time for filing a brief in opposition to and including April 27, 1977.

QUESTIONS PRESENTED

1. Whether the government may disclose private confidential information submitted to a government agency by a government contractor which information is exempt from mandatory disclosure under exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4), and the disclosure of which would violate 18 U.S.C. §1905.

2. Whether a government contractor submitting private confidential information which is assertedly exempt from mandatory disclosure under exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4), and whose disclosure would assertedly violate 18 U.S.C. §1905 is entitled to a trial *de novo* in a suit to prevent disclosure of that private information by the government.

STATUTES AND REGULATIONS INVOLVED

The petitioners' statement of the statutes and regulations involved is accepted by the respondents with the addition of two pertinent regulations for the Department of Labor, 29 C.F.R. §70.21 (Appendix F, *infra* at 1a) concerning disclosure of private information, and 29 C.F.R. §70.71 (Appendix G, *infra* at 2a), concerning the promulgation of supplementary regulations by the Office of Federal Contract Compliance Programs.

2. The respondents joining in this brief in opposition are Westinghouse Electric Corporation and General Motors Corporation. The brief of the respondent United States Steel Corporation in opposition will be filed separately. The term "respondents" when used herein refers to Westinghouse Electric Corporation and General Motors Corporation.

STATEMENT

The petitioners' statement of the case is essentially accurate. However, subsequent to the filing of the petition the party requesting disclosure of the information at issue in the *General Motors* case below moved, as *amicus curiae*, for leave to file in this Court and submitted a brief raising a "jurisdictional" issue. The respondents will reply to the motion and supporting brief of *amicus* in a separate document.

ARGUMENT

The respondents concur in the petitioners' observation that these cases raise important issues concerning the purpose of the Freedom of Information Act ("FOIA") and the rights of private parties under the Act.[3] Despite this importance, however, the reasons urged for granting the petition should be insufficient to convince the Court to exercise its discretionary jurisdiction to review the decision below. Contrary to the petitioners' assertions, the holding of the court of appeals below presents no substantial conflict with *Charles River Park "A" v. Department of Housing & Urban Development*, 519 F.2d 935 (D.C. Cir. 1975) or *Pennzoil Co. v. Federal Power Commission*, 534 F.2d 627 (5th Cir. 1976) on the issues presented by exemption 4 of the FOIA, 5 U.S.C. §552(b)(4) and 18 U.S.C. §1905. Furthermore, the court of appeals did not err, as the petitioners contend, in recognizing the respondents' right to assert their claims under

3. The importance of the issues raised in the petition is demonstrated by the recent action of the Ninth Circuit. That court has very similar issues currently pending before it, but has deferred further consideration of the matter pending this Court's decision on the petition in *Westinghouse. Hughes Aircraft Co. v. Schlesinger*, No. 75-1064 (9th Cir.) (Order Withdrawing Submission, filed April 4, 1977) (Appendix H, *infra*, at 3a). Furthermore, a petition for certiorari to the United States Court of Appeals for the District of Columbia Circuit which raises several issues closely related to those presented in *Westinghouse* is currently pending before the Court. *Prudential Insurance Co. v. National Organization for Women*, No. 76-1052 (petition for certiorari *filed* February 1, 1977).

the exemptions to the FOIA and 18 U.S.C. §1905 at a trial *de novo*.

1. The court of appeals offered three independently sufficient theories to support its affirmance of the order of the district court enjoining disclosure by the petitioners of the private confidential information submitted to them by the respondents. First, because 18 U.S.C. §1905 is one of the statutes included in exemption 3 of the FOIA, 5 U.S.C. §552(b)(3), it bars the disclosure of the information in question.[4]

---

4. 18 U.S.C. §1905 prohibits, *inter alia*, any employee of any department or agency of the United States from disclosing

> "in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any . . . return, report or record made to or filed with, such department or agency . . . which information concerns or relates to the trade secrets . . . or to the identify, confidential statistical data, amount or source of any . . . expenditures of any . . . corporation . . . ."

The court of appeals reasoned that because §1905 is one of the statutes included in exemption 3 of the FOIA, 5 U.S.C. §552(b)(3), information of a character described in §1905 was exempt from mandatory disclosure. Therefore, the FOIA could not be relied upon by the petitioners to provide the authorization of law required to permit disclosure under §1905. 542 F.2d at 1201-03.

The court also recognized that the Department of Labor's regulation, 29 C.F.R. §70.21(a), (Appendix F, *infra*, at 1a), by which the petitioners are bound, which restates the provisions of §1905 and has the effect of law, meets the qualifications of exemption 3. 542 F.2d at 1201-1203.

Shortly before the court of appeals decision was published, however, Congress amended exemption 3 of the FOIA. 5 U.S.C. §552(b)(3), *amended*, Pub. L. 94-409, 94th Cong. (September 13, 1976). This amendment may well affect future resolutions of the issue of the nexus between §1905 and exemption 3. *See* H.R. Rep. No. 94-580 (pt. 1), 94th Cong. 2d *Sess.* at 22-24 (1976).

542 F.2d at 1199-1203. In addition, the court found that exemption 4, 5 U.S.C. §552(b)(4), which relates to confidential commercial or financial information, exempts the documents from compelled disclosure under the FOIA and that §1905 therefore prohibits its disclosure. 542 F.2d at 1207-09. Finally, the court held that exemption 4, considered in conjunction with its legislative purpose, supports the implied right of a supplier of private information to invoke the equity jurisdiction of the courts to enjoin disclosure of information within the exemption. 542 F.2d at 1210-12. The court found that the exemption 4 protection from disclosure was provided not only as a matter of fairness to the supplier, but as a matter of right. 542 F.2d at 1211.

Rather than conflicting with the decision below, the first case cited by the petitioners, *Charles River Park "A", Inc. v. Department of Housing & Urban Development*, 519 F.2d 935 (D.C. Cir. 1975), supports the second theory adopted by the Fourth Circuit. That theory states that exemption 4 in conjunction with §1905 provides the respondents with the protection sanctioned below. The petitioners rely on the supplementary disclosure regulations adopted by the Office of Federal Contract Compliance Programs,[5] 41 C.F.R. Part 60-40 (Pet. App. E), to provide the authorization needed to avoid the prohibitions of §1905. (Pet. at 12, 15). *Charles River Park* holds, however, that the FOIA is neutral with regard to information within exemption 4 and does not authorize the release of such information. 519 F.2d at 942. Contrary to the contention of the respondents, under *Charles River Park* the release of exempt information can not be justified by regulations based on the

---

5. The supplementary regulations, 41 C.F.R. Part 60-40, were adopted pursuant to 29 C.F.R. §70.71 (Appendix G, *infra* at 2a). Section 70.71 requires that supplementary regulations be "not inconsistent with" other Department of Labor regulations governing disclosure of documents. 29 C.F.R. §70.71.

FOIA.[6] Therefore, even if *Charles River Park* does not agree with the Fourth Circuit's holding that exemption 4, when considered with its legislative purpose, protects the information from disclosure in these cases, it buttresses an alternative holding which is sufficient to support the judgment below.

Pennzoil Co. v. Federal Power Commission, the other case the petitioners cite to establish a conflict among the circuit courts, is readily distinguishable from the decision below. First, *Pennzoil* is not a "reverse-FOIA" case comparable to *Westinghouse, Charles River Park* or *Sears, Roebuck & Co. v. General Services Administration ("Sears II").*[7] No third party ever requested the information at issue in *Pennzoil.* No 28 U.S.C. §1331 suit was ever filed in the district court seeking declaratory or injunctive relief pursuant to the implied right of action of the FOIA exemptions and §1905. *Pennzoil* was simply an Administrative Procedure Act[8] ("APA") review of an FPC order requiring the submission of valuable data which would be open to public inspection. Unlike these cases, the agency in *Pennzoil* was promulgating an order in furtherance of its duty to regulate the industry it is charged with supervising and was acting in a matter in which it has considerable expertise.

The most important distinction between *Pennzoil* and the decision below, however, is that the issues presented by §1905 were not considered by the *Pennzoil* court. Therefore, as with *Charles River Park,* even if the *Pennzoil* construction of exemption 4 arguably conflicts with that of the Fourth Circuit, the private right of action accorded by the prohibitions of §1905

6. The court further stated that the regulations which sanctioned disclosure and thereby limited the scope of §1905 were not supported by the "housekeeping" provisions of 5 U.S.C. §301. 519 F.2d at 942-43.

7. ___ F.2d ___, 14 F.E.P. Cases 945 (1977).

8. 5 U.S.C. §701, *et seq.* (1970).

in conjunction with the FOIA exemptions suffice to support the decision below.

2. The second question presented by the petitioners is whether judicial review of an agency's decision to disclose is limited to a determination that the disclosure is not an abuse of discretion. Properly, no conflict among the circuits is alleged because the courts of appeals considering the issue have found *de novo* review appropriate. In *Sears II* the District of Columbia Circuit upheld the right to a trial *de novo* because the reverse-FOIA suit is an original proceeding based on the private right of action implied by the exemptions to the FOIA. 14 F.E.P. Cases at 946. Because reverse-FOIA suits are brought under 28 U.S.C. §1331 as declaratory judgment actions, rather than to review agency action under the Administrative Procedure Act, the district courts may pursue *de novo* consideration of the issues. Citing *Charles River Park,* the court in *Sears II* stated that the *de novo* review standard which applies in a suit to compel disclosure is also appropriate in a suit to compel nondisclosure.[9]

The petitioners cite *Camp v. Pitts,* 411 U.S. 138 (1973), in support of their contention that the inquiry in these cases should be limited to a review of the administrative record to determine whether the agency has abused its discretion. A critical distinction should be drawn, however, between the situation in *Camp* and in reverse-FOIA cases. The judgment of an agency is entitled to the deference accorded by the abuse of discretion standard when, as in *Camp,* that judgment is exercised in the area of the agency's expertise. However, the decision to disclose the information requested in these cases is not within the expertise of the petitioners.[10] The deference to which the

9. *Id.* at 5, *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190, 1213 (4th Cir. 1976).

10. In *Pennzoil* the Fifth Circuit applied the abuse of discretion standard prescribed by the APA. 534 F.2d at 631-32. As explained above, however, that case was presented to the court pursuant to the APA to review an order of the Commission in the area in which it has substantial expertise.

petitioners would be entitled by a court reviewing a decision made in the course of their administration of pertinent Executive Orders applicable to federal contractors should not extend to the review of a disclosure determination which must be based, at least in part, upon considerations of the competitive effects of releasing confidential information.[11] None of the petitioners have made any claim of expertise in such matters.

Even under *Charles River Park,* the lone court of appeals decision applying the abuse of discretion standard in a reverse-FOIA case,[12] the procedure would be essentially the same as that followed by the courts below. *Charles River Park* requires that the district court first conduct an evidentiary hearing to determine whether the information sought is exempt from disclosure. The *Charles River Park* court stated that this hearing is not a review of agency action, but rather is necessary to determine if the reverse FOIA plaintiff has a claim at all. 519 F.2d at 940-41, n.4.

The Fourth Circuit thoroughly considered the scope-of-review issue and reached the proper result in allowing the respondents to present their evidence at a trial *de novo.* According to the petitioners, the agency decision to disclose

---

11. In determining whether commercial or financial information is confidential within the meaning of exemption 4 of the FOIA, one relevant inquiry is whether disclosure would cause substantial competitive harm to the supplier of the information. *See National Parks & Conservation Ass'n. v. Morton,* 498 F.2d 765, 767-69 (D.C. Cir. 1974) and *National Parks & Conservation Ass'n. v. Kleppe,* 547 F.2d 673 (D.C. Cir. 1976).

12. 519 F.2d at 939. The *Charles River Park* court applied the abuse of discretion standard because it relied upon the Administrative Procedure Act in finding jurisdiction. However, in light of *Califano v. Saunders,* 45 U.S.L.W. 4209 (Feb. 23, 1977) and *Planning Research Corp. v. FPC,* ___ F.2d ___, No. 75-1540 (D.C. Cir. March 10, 1977), this reliance upon the APA as a jurisdictional grant was apparently misplaced. The application of the abuse of discretion standard by the court may therefore be suspect. *See Pharmaceutical Mfrs. Ass'n. v. Weinberger,* 411 F. Supp. 576, 577 n. 1 (D.D.C. 1976).

pursuant to regulations should be essentially unreviewable (Pet. at 17). The court below, however, characterized the limitation upon judicial review of agency interpretations of the prohibitions of §1905 as "an incredible rule." 542 F.2d at 1215. To require the supplier of confidential information to rely on the government to protect his interests when the *ipse dixit* of the agency would be final would be grossly unfair. *Id.* The supplier should be entitled to protect his rights through a fair and adequate hearing on proper evidence no less broad than that accorded to a curious busybody by the FOIA. *Id.*

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

Charles F. Vance, Jr.
Guy F. Driver, Jr.
Francis C. Clark
2400 Wachovia Building
Post Office Drawer 84
Winston-Salem, North Carolina 27102

Eugene L. Hartwig
General Motors Corporation
General Motors Building
Detroit, Michigan 48202

Stuart Saltman
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

APPENDIX F

Department of Labor, Rules and Regulations 29 C.F.R. §70.71

§70.21 Records not disclosable.

(a) Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law.

(b) No records of the Department of Labor with respect to matters specifically required by statute to be kept secret shall be made available for inspection or copying under the provisions of this part. By virtue of the exclusionary language in 5 U.S.C. 552(b)(3) the disclosure requirements of the Freedom of Information Act do not apply to or authorize the disclosure of records with respect to any matters specifically exempted from disclosure by staute.

(c) No records of the Department of Labor with respect to matters specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and properly classified pursuant to such order shall be made available for inspection or copying under the provisions of this part. Records concerning such matters are expressly excluded from the application of the disclosure requirements of the Freedom of Information Act by the provisions of 5 U.S.C. 552(b)(1).

APPENDIX G

Department of Labor, Rules and Regulations 29 C.F.R. §70.21

§70.71 Authority of agency officials in Department of Labor.

Each agency of the Department of Labor for which an officer or officers have authority to issue rules and regulations may through such officers promulgate supplementary regulations, not inconsistent with this part, governing the disclosure of particular or specific records which are in the custody of that departmental unit. Agencies of the Department which do not or have not promulgated special supplementary regulations governing disclosure of particular records shall disclose such records pursuant only to the provision of Subparts A and B of this Part 70.

APPENDIX H

Order Withdrawing Submission

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-1064

HUGHES AIRCRAFT COMPANY,
Plaintiff-Appellant,

-versus-

JAMES A. SCHLESINGER, SECRETARY, U.S. DEPARTMENT OF DEFENSE, LT. GEN. WALLACE ROBINSON, DIRECTOR DEFENSE SUPPLY AGENCY; PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE; PETER J. BRENNAN, SECRETARY DEPARTMENT OF LABOR,
Defendants-Appellees.

Before: BARNES, ELY and CHOY, Circuit Judges.

Submission for decision of this case is withdrawn pending the determination by the Supreme Court of the Government's petition for a writ of certiorari in *Brown v. Westinghouse,* Sup. Ct. No. 76-1192.

If the Court denied certiorari in *Brown,* this case will stand re-submitted as of the date of the denial of certiorari and if the Court grants certiorari in the *Brown* case, this case will not be re-submitted until the Court's decision in *Brown* is filed, on which date this case will stand re-submitted.

FILED
April 4, 1977

U.S. Court of Appeals
Ninth Circuit

Emil E. Melfi, Jr.
Clerk

No. 76-1192

In the Supreme Court of the United States

OCTOBER TERM, 1976

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

Although respondent United States Steel Corporation "joins in urging that the Court grant the petition for a writ of *certiorari*" (Br. 3-4),[1] it requests that the Court consider an additional question not presented in the petition, *i.e.*, "[w]hether 18 U.S.C. §1905 is a statute which specifically exempts matters from disclosure within the meaning of Exemption 3 of the Freedom of Information Act * * *" (Br. 1; see Br. 3-8). That question was answered affirmatively by the court of appeals. But we did not present the question in our petition, because, contrary to respondent United States Steel Corporation, not only is this not "the fundamental issue in this case" (Br. 5), it is not an issue that bears at all upon the disposition of the case in its present posture. Nor is

[1] Although respondents General Motors Corporation and Westinghouse Electric Corporation have filed a joint brief opposing certiorari, they nevertheless concede that these cases "raise important issues concerning the purpose of the Freedom of Information Act * * * and the rights of private parties under the Act" (Br. 2-3).

there a "clear conflict of decisions among the circuit courts" (*id.* at 7) on the question. Accordingly, we believe that this case should not be burdened by the additional question that respondent United States Steel Corporation seeks to raise.

1. If the petition is granted, this Court will have no occasion to consider the question whether material of the character described in 18 U.S.C. 1905, a criminal statute forbidding the disclosure by government officials of certain documents "in any manner or to any extent not authorized by law * * *," is protected from mandatory disclosure by exemption 3 of the FOIA. The government argues that regulations promulgated by the Secretary of Labor (41 C.F.R. Part 60-40), which provide for the disclosure of the documents in issue, "authorize" such disclosure within the meaning of 18 U.S.C. 1905. If that argument is sustained, it would be immaterial whether exemption 3 of the FOIA incorporates 18 U.S.C. 1905, since disclosure of the documents would not be prohibited by the latter provision.

If the government's argument with respect to those regulations is rejected, the Court will be left with a finding by the courts below, made after a *de novo* trial in the district court, that the documents ordered withheld are protected from mandatory disclosure by exemption 4 of the FOIA. If the Court determines that a *de novo* trial should not have been held, the appropriate disposition of the case would be to vacate and remand. That disposition would not require the Court to consider whether exemption 3 incorporates 18 U.S.C. 1905. If the Court determines that the *de novo* trial was proper, then the finding of the courts below that the documents are protected from mandatory disclosure by exemption 4 would make it unnecessary for the Court to decide whether the documents also were protected from mandatory disclosure by exemption 3.

2. Respondent United States Steel Corporation alleges (Br. 7) a conflict between the Fourth Circuit and the District of Columbia Circuit on the question whether 18 U.S.C. 1905 is an exemption 3 statute. There is no conflict. In *Sears, Roebuck and Co.* v. *General Services Administration,* No. 75-2127, decided April 1, 1977,[2] the District of Columbia Circuit explained that that question is open to reconsideration in that circuit, in view of this Court's decision in *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, and the recent amendment to the wording of exemption 3 (Pub. L. 94-409, 90 Stat. 1247).[3] That amendment did not become effective until after the Fourth Circuit's decision in this case, and it does not appear that the court below gave consideration to the effect the amendment might have on the question.[4] Thus, neither the Fourth Circuit nor the District of Columbia Circuit can be said to have ruled definitively on the question respondent United States Steel Corporation would have this Court consider.

---

[2]The court of appeals' opinion in *Sears* is set forth in an Appendix to the supplemental memorandum for the federal respondents in *Prudential* v. *National Organization for Women,* No. 76-1052.

[3]The court said its statement in *National Parks and Conservation Association* v. *Kleppe,* 547 F. 2d 673—that the newly amended exemption 3 did not incorporate 18 U.S.C. 1905—was *dicta.* It remanded in *Sears, supra,* slip op. 13, with the instruction to the district court that it "is free to reconsider" the question.

[4]The Fourth Circuit, in holding that 18 U.S.C. 1905 was an exemption 3 statute, depended in large measure upon analogy to this Court's decision in *Administrator, Federal Aviation Administration* v. *Robertson, supra,* which concerned Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U.S.C. 1504. But the express congressional purpose of the recent amendment to exemption 3 was to effect a legislative overruling of the specific holding in *Robertson.* See H.R. Rep. No. 1178, 94th Cong., 2d Sess. 14 (1976).

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted, limited to the questions presented therein.[5]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

---

[5]Reuben B. Robertson, III, has filed a brief as *amicus curiae* in support of the government's petition for a writ of certiorari. (It was petitioners' decision to honor Robertson's FOIA request that led respondent General Motors to institute its "reverse FOIA" suit to enjoin disclosure.) But in addition to the questions presented in the petition, Robertson requests that the Court also consider the question whether he is an indispensable party to this action and must be joined as a party pursuant to Rule 19, Fed. R. Civ. P.

Robertson's request is untimely. He was aware that respondent General Motors had brought suit in the District Court for the Eastern District of Virginia, but he made no effort to intervene as a party in the district court or in the court of appeals. See Rule 24, Fed. R. Civ. P. Nor did he attempt in either forum to have his views considered. Instead, Robertson chose to bring a separate FOIA suit against the government in the District Court for the District of Columbia, claiming that the information in question was subject to mandatory disclosure. *Robertson* v. *Department of Defense*, 402 F. Supp. 1342 (D. D.C.). Having elected not to present to the courts below the argument he now seeks this Court to consider, Robertson should not be permitted at this late date to interpose the issue whether he should have been joined as an indispensable party.

DOJ-1977-05

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1192

HAROLD BROWN,
Secretary of Defense, *et al.*,

Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE AND BRIEF OF REUBEN B. ROBERTSON III, *AMICUS CURIAE*, SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI AND URGING THE COURT TO ORDER BRIEFING OF A JURISDICTIONAL ISSUE NOT CONTAINED IN THE PETITION

ALAN B. MORRISON
LARRY P. ELLSWORTH
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Amicus Curiae

March 18, 1977

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1192

HAROLD BROWN,
Secretary of Defense, *et al.*,

Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Respondents.

MOTION OF REUBEN B. ROBERTSON III FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

On November 2, 1973, the *amicus curiae*, Reuben B. Robertson III, made a request of petitioners under the Freedom of Information Act for documents submitted by one of the respondents herein, General Motors Corporation. That request was the direct cause of an action brought by General Motors to enjoin the release of the requested documents, and the judgment in that action

against petitioners and in favor of General Motors is one of those on which certiorari is sought. Thus, but for the request of *amicus*, there would have been no lawsuit, and hence that part of the petition would never have been brought before this Court.

Despite the direct interest of Mr. Robertson in the outcome of the action brought by General Motors, no party in that action, and neither the District Court nor the Court of Appeals, ever sought to join him as a party pursuant to Rule 19 of the Federal Rules of Civil Procedure. Therefore, he brought his own action under the Freedom of Information Act, naming the petitioners as well as General Motors as defendants. Such a course of action was particularly appropriate in this instance, since the petitioners had agreed to release only a portion of the documents requested and, therefore, it was apparent that his interest could not be adequately represented by petitioners.

The lack of adequate representation of Mr. Robertson's interest has continued to this Court. Petitioners, who are nominally on the side of the requester, have once again failed to assert that General Motors erred in not joining him as an indispensable party as required by Rule 19. Although this Court could, on its own motion, direct the parties to brief the applicability of Rule 19, the attached *amicus* brief, which is directed solely to that question, should aid the Court in its consideration of that issue.

The consents of the petitioners and of General Motors, the only party respondent with an interest in this issue, have been sought. Both petitioners and General Motors have declined to consent to the filing of the brief.

Petitioners did not decide to seek review of the decision below until shortly before they filed on February 28, 1977. *Amicus* promptly obtained a copy of the petition and has attempted to file as soon as possible after reviewing the petition and determining whether to seek review of the additional question presented in its brief.

WHEREFORE, it is respectfully requested that the accompanying brief *amicus curiae* of Reuben B. Robertson III, urging the Court to order the petitioners and General Motors to brief the additional jurisdictional issue of the applicability of Rule 19 to the action instituted by General Motors, be permitted to be filed.

Respectfully submitted,

ALAN B. MORRISON
LARRY P. ELLSWORTH
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Amicus Curiae

Dated: March 18, 1977

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Rules and Advisory Notes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1192

HAROLD BROWN,
Secretary of Defense, *et al.*,

Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Respondents.

BRIEF OF REUBEN B. ROBERTSON III, *AMICUS CURIAE*, SUPPORTING THE PETITION AND URGING THE COURT TO DIRECT THE BRIEFING OF A JURISDICTIONAL ISSUE NOT CONTAINED IN THE PETITION.

The *amicus curiae*, Reuben B. Robertson III, supports the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. This brief sets forth an additional ground for reversing that portion of the judgment involving the action brought by the

respondent General Motors Corporation: the failure of General Motors to join *amicus* as an indispensable party, when it was his Freedom of Information Act request which triggered General Motors' suit to enjoin petitioners from releasing the requested records. That failure directly contravenes Rule 19 of the Federal Rules of Civil Procedure and is an error which this Court should notice and correct.

ADDITIONAL QUESTION PRESENTED

Did petitioners and General Motors, as well as both courts below, err in failing to join, as an indispensable party under Rule 19 of the Federal Rules of Civil Procedure, the person whose request to petitioners under the Freedom of Information Act directly triggered the action by General Motors seeking to enjoin petitioners from releasing the records in question?

INTERESTS OF *AMICUS CURIAE*

Amicus is the person whose request under the Freedom of Information Act led to the action brought by General Motors. The documents that he seeks are the subject of the action brought by General Motors against petitioners. His interests are described more fully in his accompanying motion for leave to file this brief and in the statement which follows.

RULE INVOLVED

Rule 19, Federal Rules of Civil Procedure

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be

considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

STATEMENT

As the petition plainly demonstrates, there are a number of difficult and important substantive issues involved in so-called "reverse" Freedom of Information Act cases. Accordingly, *amicus* urges this Court to give full consideration to them, and it supports the positions of the petitioners with respect to them. This brief is submitted with respect to a different issue, one which has never been raised by any party or by either court below: the failure of respondent General Motors to join or explain the non-joinder of *amicus* Robertson, even though it was

amicus who had requested the documents which are the subject of General Motors' action.[1]

The facts are simple and not in dispute. They are set forth in the opinions below (App. A and C to the petition) and in the only opinion in the separate action brought by the *amicus*, *Robertson v. Department of Defense*, 402 F. Supp. 1342 (D.D.C. 1975), which is set forth as an appendix to this brief (Appendix F). The events leading to the actions which are the subject of the petition began on November 2, 1973, when Mr. Robertson made a Freedom of Information Act ("FOIA") request of the petitioners for certain documents relating to the employment practices of General Motors regarding minorities and women. After considerable negotiation, and after advising General Motors of *amicus'* request, petitioners decided to release some but not all of the documents to *amicus*.

Thereafter, on April 10, 1974, General Motors brought an action against petitioners in the United States District Court for the Eastern District of Virginia, Alexandria Division, to prevent such release, but its complaint neither named *amicus* as a party nor explained why he was not

---

[1] In another of the consclidated cases which are the subjects of this petition, the requesting party (the Legal Aid Society of Alameda County, California) was also not joined in the suit brought by Westinghouse Electric Corporation. However, the Society intervened in the district court and participated below, thereby rendering the question presented by *amicus* moot with respect to that action. In the third of these cases, brought by the United States Steel Corporation, the requester has, as far as *amicus* is aware, neither sought to intervene nor brought an independent action for the documents.

joined. Although *amicus'* residence and office are across the Potomac River from the courthouse in Alexandria, and although service of process pursuant to Rule 19 would have been authorized by Rule 4(f) of the Federal Rules of Civil Procedure, General Motors failed even to notify *amicus* of the action. *Amicus* first learned of the Virginia action from a letter sent by petitioners on April 19, 1974, seven days after General Motors had obtained a temporary restraining order enjoining petitioners from releasing the civil rights documents that they had previously determined should be released to Mr. Robertson. While petitioners did seek unsuccessfully to have the action transferred to the District of Columbia, they at no time moved under Rule 12(b)(7) to have the action dismissed for failure to join *amicus* pursuant to Rule 19, nor moved to require General Motors to explain the nonjoinder as required by Rule 19(c).

Amicus recognized that if "reverse FOIA" plaintiffs such as General Motors could determine the choice of forum by suing in Virginia, thus forcing requesters to intervene or lose their right to be heard, the reverse FOIA plaintiffs could just as well bring their next action in Detroit or New York or some even more inconvenient place. Indeed, in the other cases that are the subject of the instant petition, Westinghouse and United States Steel Corporation sued in Virginia, while the requesters resided in California and Pennsylvania, respectively. Thus, for *amicus* to have intervened in Alexandria would have required him to surrender the broad choice of forums which Congress expressly granted to requesters under the FOIA, 5 U.S.C. § 552(a)(4)(B). Therefore, on April 26, 1974, he filed his own complaint in the United States District Court for the District of Columbia, naming both petitioners and General Motors as defendants.

The action brought by General Motors proceeded to judgment in Virginia on September 20, 1974, and the Fourth Circuit stayed the portion of the order which permitted the release of some of the documents requested. Over two years later, on September 30, 1976, the Court of Appeals issued its decision, holding for respondents on all claims, and the Government's petition followed.

Meanwhile, in the District of Columbia, General Motors sought summary judgment, claiming that the court in Virginia had exclusive jurisdiction over the documents, that principles of comity precluded the District of Columbia case from proceeding, and that, since a judgment had been entered in Virginia, collateral estoppel was a bar. On June 19, 1975, District Judge Barrington Parker denied the motion of General Motors in its entirety, and in addition granted *amicus* Robertson's motion for partial summary judgment with respect to two of the defenses raised by General Motors. App. F. at 10a, 14a. *Amicus* does not seek review of any of the issues resolved in that action, which has not yet proceeded to judgment. What he does seek is review of the failure of respondent General Motors to join him in the Virginia action pursuant to Rule 19, the failure of petitioners to move pursuant to Rule 12(b)(7) to require such joinder, and the failure of the courts below to invoke Rule 19 on their own as they are plainly entitled to do.[2] The result of these successive failures has

---

[2] *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (hereinafter "*Provident*"); *Hoe v. Wilson*, 76 U.S. (9 Wall.) 501, 504 (1870); *Boles v. Greenville Housing Authority*, 468 F.2d 476, 479 (6th Cir. 1972); *Brown v. Christman*, 126 F.2d 625, 632 (D.C. Cir. 1942); *Advisory Committee Notes to Rule 19*, 39 F.R.D. 88, 93.

been, and continues to be, a duplication of actions involving an identical controversy, with all of the parties present only in the action brought by *amicus* in the District of Columbia, and with *amicus*, the only person with a direct interest in disclosure, having been excluded from the Virginia action which is now before this Court.

REASONS FOR GRANTING THE WRIT

THE QUESTION PRESENTED BY *AMICUS* IS AN IMPORTANT ONE THIS COURT SHOULD RESOLVE

According to the petition (p. 11 n.15), during 1976 alone, at least 78 reverse FOIA cases were brought seeking to preclude the release of documents which a federal agency desired to make public. Rarely, if ever, were requesting parties joined in such cases. The failure of reverse FOIA plaintiffs such as General Motors to name the requesting party as a defendant, or to explain why joinder was not made as required by Rule 19(c), is readily understandable, but not defensible. Reverse FOIA plaintiffs have no incentive to join requesting parties who have a direct interest in obtaining the documents, particularly since many agencies, including one of the petitioners here, view their role as being "basically a stake holder" (App. G at 16a, *infra*). Moreover, in situations such as this, where petitioners agree with General Motors that portions of the documents need not be released, the failure to add the requesting party permits the dispute to be narrowed, and hence the Government as well as reverse plaintiffs may gain by not joining the injured requester.

The failure to join the requesting party also permits the plaintiff in reverse FOIA cases far greater latitude

in forum shopping, since only a federal agency is a defendant. *See* 28 U.S.C. § 1391(e). For example, in these cases, Westinghouse brought suit in the Eastern District of Virginia when the requesting party was the Legal Aid Society of Alameda County, California. Inconvenient forums are always a problem, but their difficulty is exacerbated by the fact that in most reverse FOIA cases a temporary restraining order and then a preliminary injunction is sought, thus requiring the requester to obtain counsel in the distant forum immediately if he wishes to protect his interests, assuming that he is fortunate enough to learn of the action in time.

Another example of the problem is illustrated by the situation in which ten television manufacturers filed separate reverse FOIA actions in four separate jurisdictions in an effort to stop the Consumer Product Safety Commission from releasing data on accidents caused by color television sets; in none of them were the requesting parties joined. Even after all ten cases were consolidated in the District of Delaware, no attempt was made by the defendant or the court to bring in the requesters pursuant to Rule 19.[3] There, as in *Robertson*, an action was commenced in the District of Columbia where all of the parties could be properly joined, and where all of the safety reports in question had been initially filed by the reverse FOIA plaintiffs. That action was dismissed on grounds of non-justiciability, with the district court concluding that, because the agency had agreed that disclosure was required by the FOIA, there was no case or controversy although the agency still refused to release the records because of the pending actions in Delaware. *Consumers Union v.*

---

[3] *See GTE Sylvania, Inc. v. Consumer Product Safety Comm.*, 404 F. Supp. 352 (D. Del. 1975).

Consumer Product Safety Comm., 400 F. Supp. 848 (D.D.C. 1975), *appeal argued*, No. 75-2059 (D.C. Cir., Sept. 21, 1976). One of the issues raised on that appeal is the applicability of Rule 19 to the cases in Delaware, the same issue which *amicus* asks this Court to consider here.

In almost every reverse FOIA case, plaintiffs are corporations for which money is little, if any, object and the requesters are private citizens or small public interest organizations in no position to retain counsel to represent their interests around the country. Such disparity is particularly likely to occur in situations such as this where equal employment documents are at issue. Given the fact that reverse FOIA actions are apparently maintainable in the corporation's state of incorporation, its principal place of business, where the documents are located, or in the District of Columbia, the invitation for forum shopping is great, and it can readily be used to disadvantage requesting parties unless some form of relief is provided.

Many requesting parties are left with little choice but to rely upon the government to defend them. Others, like *amicus*, are not deterred and have brought their own lawsuits, thereby adding another case to federal court dockets. Since the law is clear that, in a situation such as this, the requesting party cannot be denied its right to challenge the validity of the withholding in some court at some time,[4] it is apparent that the failure of General

---

[4] *Hanson v. Denckla*, 357 U.S. 235, 249-50, 254-55 (1958); *Western Union Telegraph Co. v. Commonwealth of Pennsylvania*, 368 U.S. 71, 75 (1961); *Provident*, *supra*, 390 U.S. at 110; and *Advisory Committee Notes to Rule 19*, 39 F.R.D. at 89.

Motors to join all parties, including *amicus*, in a single action will inevitably lead to more rather than less litigation.

The solution is quite simple, although it was neglected by the parties and the courts below. Rule 19 requires the joinder of additional parties whose interests may be significantly affected in a pending action. It is a flexible rule which enables the courts to insure that justice is done and which protects the interest of the public "in avoiding repeated lawsuits on the same essential subject matter." *Advisory Committee Notes to Rule 19*, 39 F.R.D. at 91. Especially when coupled with the transfer provisions of 28 U.S.C. § 1404(a), and the liberal venue provisions of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), there will remain few if any problems of joinder that Rule 19 cannot solve. By utilizing Rule 19, the result will be one rather than two lawsuits, but without it, only this Court can resolve those cases in which there are two or more directly conflicting orders regarding the disclosure of an agency's records. *See Robertson v. Department of Defense*, *supra*, App. F at 7a.

Although the merits of the Rule 19 question were not addressed below, the facts on which a determination needs to be made are clear and fully capable of resolution by this Court. Without passing on the applicability of subsection (a)(1), it is apparent that under both subdivisions (i) and (ii) of Rule 19(a)(2), joinder is required if feasible. If, as is the case here, there is proper subject matter jurisdiction under the original complaint against the federal defendants, private parties, such as *amicus*, can be joined under Rule 19 without a further basis of subject matter jurisdiction. *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971). In addition, *amicus*, whose residence and business office are in Washington,

D.C., is well within 100 miles from the courthouse in Alexandria, and thus service on him can be made pursuant to Rule 4(f). And if venue were contested, *amicus* could be dismissed or, more properly, the action could be transferred under section 1404(a) to a place of proper venue.[5]

In other cases, a reverse FOIA plaintiff may not be able to obtain personal jurisdiction under Rule 4(f) in the forum in which the action is brought and thus will have to refile elsewhere. Theoretically, there may be cases where all parties cannot be brought before any court – an unlikely prospect with the government as the other defendant – and the court would then have to decide under the "equity and good conscience" standard of Rule 19(b) whether the case should proceed without the requester or be dismissed. In making such a determination, it will be guided by the "stated pragmatic considerations," *Provident, supra,* 390 U.S. at 107, which are set forth in the four criteria of Rule 19(b). Of course, this Court cannot decide a series of future Rule 19 cases in the context of this petition, but what it can do, and what *amicus* urges it to do, is to require the parties to brief the applicability of Rule 19 to reverse FOIA actions such as this, in which the known requesting party is not joined and the complaint fails to include any explanation of why joinder did not take place. This issue is of increasing importance to the

---

[5] One of the principal reasons for non-intervention in this case was a concern on the part of *amicus* that upon intervention, there might be no opportunity to move to have the action transferred to the forum of his choice (the District of Columbia), since some courts have denied a party electing to enter a lawsuit through intervention the right to move to transfer. *See, e.g., Commonwealth Edison Co. v. Train,* 71 F.R.D. 391, 394 (N.D. Ill. 1976).

federal courts, and a determination of it by this Court can greatly simplify the procedures in reverse FOIA cases and can provide clear and meaningful guidelines for the parties and the courts in what has become an increasingly complex field of federal litigation.

CONCLUSION

For all of the foregoing reasons, *amicus* Reuben B. Robertson III urges that this Court grant the petition for a writ of certiorari and include as a question presented the applicability of Rule 19 to the action brought by respondent General Motors against these petitioners.

Respectfully submitted,

ALAN B. MORRISON
LARRY P. ELLSWORTH
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Amicus Curiae

March 18, 1977

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REUBEN B. ROBERTSON III, *Plaintiff,* v. DEPARTMENT OF DEFENSE, JAMES R. SCHLESINGER, and GENERAL MOTORS CORPORATION, *Defendants.*	)	Civil Action No. 74-644

Before
BARRINGTON D. PARKER
UNITED STATES DISTRICT JUDGE

Decided: June 19, 1975

MEMORANDUM OPINION

This is an action brought under the Freedom of Information Act (FOIA or Act), 5 U.S.C. §552 (1970), in which Reuben B. Robertson, III, a private citizen, seeks to obtain access to certain civil rights compliance reports submitted by the defendant General Motors Corporation (GM) to the defendant Department of Defense. Also named as a defendant is James R. Schlesinger, Secretary of Defense.

By Executive Orders 10925[1] and 11114[2] a Federal policy was promulgated requiring companies contracting

[1] 26 Fed. Reg. 1977 (1961).

[2] 28 Fed. Reg. 6485 (1963).

with the United States Government to agree not to discriminate against an employee or applicant for employment because of race, color, religion, sex or national origin. The Department of Labor was designated by Executive Order 11246[3] to assure that contractors comply with their non-discrimination contract commitment. Under regulations issued by the Department of Labor each government contracting agency is primarily responsible for obtaining compliance.[4] Within the Department of Defense, the Director of the Defense Supply Agency (DSA) and more particularly the DSA Office of Contract Compliance bears this responsibility subject to the Department of Labor regulations. Among these regulations are provisions requiring government contractors to submit compliance information and reports to the contracting agency. These include annual reports on Standard Form 100 (EEO-1's)[5] and Affirmative Action Plans (AAP's).[6]

The plaintiff seeks injunctive relief, compelling disclosure of documents submitted by GM to the Department of Defense: the 1973 EEO-1's and AAP's for facilities located in Bedford, Indiana and Danville, Illinois.

The issues presently before the Court are: (1) whether the proceedings in a similar action filed in the United States District Court for the Eastern District of Virginia, which are summarized *infra*, involving the same documents, require entry of summary judgment in favor of GM, and, if not, (2) whether plaintiff Robertson is entitled to par-

---

3 As amended, 3 C.F.R. 169 (1974).

4 41 C.F.R. § 60-1.6 (1974).

5 41 C.F.R. § 60-1.7(a) (1974).

6 41 C.F.R. Parts 60-2 and 60-60 (1974).

tial summary judgment on the grounds that the documents are not, as urged by GM, within the scope of the third and sixth exemptions of the FOIA, 5 U.S.C. §552 (b)(3) and (6). General Motors has filed a motion for summary judgment and the plaintiff has filed a cross-motion for partial summary judgment. For reasons set forth in this opinion, the Court concludes that GM's motion for summary judgment should be denied, and Robertson's motion for partial summary judgment should be granted.

On November 2, 1973 plaintiff first requested copies of the above documents from the DSA. There then ensued correspondence between the DSA and GM and the DSA indicated its intention to make certain portions of the documents available to the plaintiff.

Shortly thereafter, on April 10, 1974, GM filed suit against the Department of Defense, the Defense Supply Agency, the Office of Federal Contract Compliance and the Department of Labor in the United States District Court for the Eastern District of Virginia seeking an injunction against disclosure of the documents.[7] In that action GM claimed that the documents were exempt from disclosure under the fourth exemption of the Act as "matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential."[8] General Motors further claimed that the documents were exempt from disclosure under 42 U.S.C.

---

7 General Motors Corp. v. Schlesinger, et al., C.A. No. 195-74-A (E.D. Va., filed Apr. 10, 1974).

8 5 U.S.C. § 552(b)(4).

§2000e-8(e) and 18 U.S.C. §1905.[9] On April 12, 1974 that court issued a temporary restraining order against the defendants, directing them not to release any portions of the documents. Approximately a week later Robertson learned of the Virginia action, but made no attempt to intervene. Instead, on April 26, 1974, he filed the FOIA proceeding in this Court.

A preliminary injunction was issued by the Virginia court on May 9, 1974. Later, on December 20, 1974 a decree of permanent injunction was entered enjoining the defendants from releasing certain portions of the documents. The court found that those portions fell within the fourth exemption of the FOIA and were protected from disclosure by 18 U.S.C. §1905. On February 27, 1975 the United States Court of Appeals for the Fourth Circuit, expressing no views on the merits, issued a stay pending appeal directing the defendants not to release any portions of the documents.[10]

The federal defendants in this action have taken the position that certain portions of the documents are confidential commercial or financial data which, if released, could injure GM's competitive position and are exempt from disclosure under the fourth exemption. Other portions would be disclosed were it not for the Virginia injunction. These defendants have not taken any position on the two motions presently before the Court—that of

---

9 42 U.S.C. § 2000e-8(c) makes unlawful disclosure by employees of the Equal Employment Opportunity Commission of certain confidential information.

10 General Motors Corp. v. Schlesinger, No. 75-8059 (4th Cir., stay entered Feb. 27, 1975).

GM for summary judgment and Robertson for partial summary judgment.

MOTION OF GENERAL MOTORS FOR SUMMARY JUDGMENT

A multi-pronged argument is launched by GM to support the summary judgment motion: (1) exclusive jurisdiction; (2) comity; and (3) collateral estoppel.

Exclusive Jurisdiction

General Motors advances the argument that the Virginia District Court, having first exercised jurisdiction over the question of access to the documents, has sole and complete jurisdiction. Such an argument depends entirely, however, on analogizing the Virginia and District of Columbia proceedings to actions in rem or quasi in rem. In such proceedings the governing principle is that the court having custody and control over the property or res may proceed to grant the appropriate relief. And where two courts attempt to exercise in rem or quasi in rem jurisdiction over the same property the doctrine provides that the court first acquiring jurisdiction proceeds without interference from the other. *Princess Lida v. Thompson,* 305 U.S. 456 (1939); *United States v. Bank of New York & Trust Co.,* 296 U.S. 463, 477 (1936), and cited cases.

A proceeding in rem is traditionally regarded as one taken against the property itself for the purpose of disposition among contesting claimants. But in this proceeding Robertson is not asserting any right, title or possessory interest in the requested documents. Rather, he seeks only access to and review of them under the Act and

injunctive relief to secure those results against the defendants over whom this Court has jurisdiction. This proceeding is not one in rem, and where the judgment sought is in personam and an injunction is requested compelling or restraining action by a defendant, federal courts having concurrent jurisdiction may proceed until a final determination in one court affords the possible defense of res adjudicata. *Penn General Casualty Co. v. Pennsylvania,* 294 U.S. 189, 195 (1935).

The Court finds no support for and therefore rejects GM's argument that exclusive jurisdiction is with the Virginia court.

Comity

General Motors also contends that the principle of comity requires this Court to abstain from entertaining this action, as to do so would interfere with the jurisdiction of the Virginia courts. Upon analysis, however, this contention should be rejected. .

As stated in *Great Northern Railway Co. v. National Railroad Adjustment Board,* 422 F.2d 1187, 1193 (7th Cir. 1970):

> [T]he comity doctrine . . . requires that when two *identical* actions are filed in courts of concurrent jurisdiction the one which first acquired jurisdiction should be the one to try the lawsuit. The purposes of the rule are to avoid unnecessarily burdening courts and to avoid possible embarrassment from conflicting results.

> Technically, the concept of comity has no application in cases like the instant one in which the two pending suits involve *different parties, different causes of action, and different issues.* (Added emphasis).

First, it is clear that identity of parties is lacking between the present and the Virginia proceeding. Likewise, there is a difference in the factual and legal issues. Plaintiff in this action seeks access to all portions of the documents. He asserts a claim to the documents claiming that exemptions three, four and six in the FOIA do not apply. However, in the Eastern District of Virginia proceeding the issues involved the third and fourth exemptions and the permanent injunction of December 20, 1974 was predicated on only the fourth exemption. The federal defendants in that proceeding challenged on a limited basis General Motors' attempt to obtain an injunction and agreed that certain portions of the documents were exempt from disclosure under exemption four of the Act.

Since this Court finds in its discussion of the collateral estoppel issue, *infra,* that plaintiff's interests were not represented in the Virginia court, it necessarily follows that the comity argument is without merit.

Any danger that the Department of Defense could find itself the object of inconsistent injunctions can be mitigated through the use of stays pending final determination of the legal issues. *Cf. Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939).

Collateral Estoppel

The final basis of GM's summary judgment motion is that Robertson's suit is barred by collateral estoppel, the

issues now presented having been resolved against him in the Virginia action.

Central to the argument is the claim that Robertson's interests were represented adequately by the government in the Eastern District action. Arguing that "it is old law that a governmental body may represent its citizens in litigation, and that a judgment against that governmental body is as conclusive on the citizen as it would have been had they been parties of record," GM refers to two turn-of-century state court decisions. *Healy v. Deering*, 83 N.E. 226 (Ill. 1907); *People v. Holladay*, 29 P. 54 (Cal. 1892).

These cases held that where the state's claim of ownership of real property has been rejected in court, a private citizen cannot thereafter sue, as representative of the public, for a declaratory judgment that the property is publicly owned. However, they are so clearly distinguishable from the situation now before the Court as to require little comment. The parties are not disputing ownership of anything, let alone real property. Robertson is not suing as a representative of the public, but is asserting a purely personal right bestowed upon him by the FOIA.

The other authority summoned is *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944), cited to "illustrate the principle of government representation." There, our Court of Appeals permitted adjoining landowners to intervene for the purpose of appealing from a district court judgment setting aside a zoning order. While the opinion suggests that a government agency may sufficiently represent individual citizens so as to bind them by a judgment, close analysis indicates that *Wolpe* is not concerned essentially with collateral

estoppel but rather the question of intervention. As it then read, Rule 24(a), F.R. Civ. P., required that the intervening party show that he would be "bound by a judgment in the action." The appellate court focused on the obvious proposition that "a decree setting aside a zoning order" would bind the landowners to the extent that it would deprive them of their statutory right[11] to sue to enforce the order. 144 F.2d at 507. The problem the court was faced with—*viz.* permitting parties with a real interest to intervene—was alleviated when Rule 24(a) was amended in 1966 to eliminate any reference to the intervenor's being bound by the judgment. As the Advisory Committee Note to the 1966 amendment states: "[The amendment] frees the rule from undue preoccupation with strict considerations of res judicata."

The Court therefore finds no support in the cases cited by GM for the view that the government was Robertson's legal representative in the Virginia action, so as to subject him to collateral estoppel. Furthermore, the Court finds little support in logic or experience for the argument that in this type of litigation, where GM has obviously sought a forum of its choice, that a private citizen's interests are represented by the government in a suit involving disclosure of information. Indeed, the history of the FOIA clearly reflects that in this area the government's and the citizen's views have rarely coincided.[12] And more particularly, in the Virginia proceeding and in the matter before

---

[11] Under 5 D.C. Code § 422 (1973).

[12] *See*, Senate and House Reports on the FOIA. S. Rep. No. 813, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966).

this Court the government has never taken the position espoused by Robertson—that the documents, in their entirety, are obtainable under the Act. Therefore, the Court concludes that Robertson was not represented by the Federal defendant in the Virginia action and cannot be subject to collateral estoppel. The three grounds asserted in GM's motion for summary judgment are lacking in merit and are rejected.

MOTION OF ROBERTSON
FOR PARTIAL SUMMARY JUDGMENT

We turn now to a consideration of two defenses asserted by General Motors which they argue preclude plaintiff's attempted access to the documents: first, that the documents cannot be disclosed because they are protected by other statutes, exemption three of the Act; second, that the documents contain data which if disclosed would constitute an unwarranted invasion of personal privacy, exemption six of the Act. As to these arguments the plaintiff Robertson asserts that as a matter of law he is entitled to partial summary judgment.

The Third Exemption

General Motors contends that disclosure of the information sought by the plaintiff is prohibited by the third exemption of the Act, §552(b)(3), which provides that the FOIA ". . . does not apply to matters that are—specifically exempted from disclosure by statute." In support of this position it relies upon two federal statutes: §709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-8(e), which applies criminal penalties against officers of the Equal Employment Opportunity Commission

for unauthorized disclosure of documents; and §1905 of Title 18 of the Criminal Code which proscribes the disclosure of confidential statistical data, amount or source of any income, profits, losses, or expenditures of any corporation by government officials or employees.[13]

But the precise arguments advanced by GM as to these statutes have only recently been rejected by this Circuit in *Sears, Roebuck & Co. v. General Services Administration,* 509 F.2d 527 (D.C. Cir. 1974). In that case Sears sought to prevent disclosure of its EEO forms and AAP's and, in sustaining fully the District Court's ruling that neither statute applied, our Appellate Court, at page 529, observed:

> [T]he data in question . . . was not collected by the EEOC, nor was it obtained pursuant to EEOC authority. *Section 709(e) does not apply.* . . . This Court has indicated that *§1905 does not fall within the ambit of exemption (b)(3)* because it does not itself define what information is exempt from disclosure. Grumman Aircraft Engineering Corp. v. Renegotiation Board, 138 U.S. App. D.C. 147, 149, n. 5, 425 F.2d 578, 580 n. 5 (1970); Robertson v. Butterfield, 162 U.S. App. D.C. 298, 300, 498 F.2d 1031, 1033 n. 6 (1974). (Footnote omitted; emphasis added).

---

[13] Section 709(e), a criminal statute, prohibits officers and employees of the Equal Employment Opportunity Commission from making public, information obtained by the Commission pursuant to its authority under Title VII. Section 1905 of 18 U.S.C. penalizes government employees who release trade secrets, statistical or financial data submitted to the government.

In addition, two District Court opinions from the Ninth Circuit involving AAP's and EEO-1's likewise found inapplicable §709(e) of Title VII. *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 295 (C.D. Cal. 1974); *Legal Aid Society of Alameda County v. Shultz*, 349 F. Supp. 771, 775-6 (N.D. Cal. 1972). These opinions have not been rejected or modified in any way by the appellate court of that circuit.

The Sixth Exemption

Section 552(b)(6) of the Act denies access to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." GM claims that since the documents constitute personnel files they are, therefore, exempt from disclosure.

It urges that the above provision should be read so as to exempt from disclosure *all* personnel files and that the further language of (b)(6)–"the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"–is not to be construed as qualifying "personnel files" but only "similar files." This is a distorted construction and GM candidly admits that the unwarranted invasion of privacy test has been held in this jurisdiction to apply to "personnel and medical files" as well as "similar files." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971); *Ackerly v. Ley*, 420 F.2d 1336, 1339–40 n. 3 (D.C. Cir. 1969).

Nor can GM successfully urge exemption from disclosure of the documents on the ground that such would constitute an unwarranted invasion of privacy. It does not appear that corporate privacy was embodied within

the provisions of the sixth exemption.[14] This result is supported by the legislative history to the original Act[15] and it may be clearly inferred from the opinions of this Circuit.[16]

In other contexts, courts have also rejected corporate claims to a right of privacy.[17] In *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), the Supreme Court stated:

> corporations can claim no equality with individuals in the enjoyment of a right to privacy. (Citation omitted). They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

Having considered the words "personal privacy" in their context, the legislative history of the sixth exemption, and the lack of any indication that Congress intended any significant departure from the traditional legal view of privacy, the Court finds that 5 U.S.C. §552(b)(6) recognizes no exemption based on a right of privacy in corporations.

---

[14] *See*, K. Davis, *Administrative Law Treatise* § 3A.22, at 163-4 (Supp. 1970).

[15] *Supra*, n.12.

[16] *See: Rural Housing Alliance v. United States Dep't. of Agriculture*, 498 F.2d 73, 76-78 (D.C. Cir. 1974); *Getman v. NLRB, Supra. See also, Washington Research Project, Inc. v. Dep't. of HEW*, 366 F. Supp. 929, 937 (D.D.C. 1973), *modified*, 504 F.2d 238 (D.C. Cir. 1974).

[17] *See generally*, 62 Am. Jur. 2d *Privacy* § 11 (1972).

The Court has examined the AAP's and EEO-1's *in camera* and has found no references to identified employees of GM. The Court concludes therefore that disclosure of the documents would not "constitute a clearly unwarranted invasion of personal privacy."

Accordingly, partial summary judgment will be entered in favor of plaintiff as to the third and sixth exemptions.

Counsel for plaintiff is directed to submit a proposed order in conformity with this opinion within five days.

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

Dated: June 19, 1975

Appendix G

DSAH-G 1 November 1974

MEMORANDUM FOR DEPUTY GENERAL COUNSEL
DEPARTMENT OF DEFENSE

SUBJECT: Administrative Conference Study on Judicial Review of Federal Administrative Action

In response to your Memorandum of 10 October 1974 the following responses are provided to the questionnaire on judicial review of agency actions:

1. We are aware of no actions of the Defense Supply Agency that are reviewed in the first instance by courts of appeals. No court of appeals has exclusive venue with respect to any category of agency action.

2. Since January of 1974 this Agency has been a party to 49 actions in United States District Courts and 25 actions in the United States Court of Claims. In 1973 we were litigants in 21 actions in the District Courts and 25 actions in the Court of Claims. Available records go back to December of 1972 at which time we had 15 pending cases in the District Courts and 93 pending cases in the Court of Claims. No separate records are maintained on district court cases appealed to the courts of appeals as only a very small proportion of the case load is so appealed. One case in which the Agency is a party is currently in a court of appeals. The following is a summary of the types of cases filed since 1 January 1974 in Federal District Courts in which this Agency is a party:

a. Contract and procurement – 20,

b. Freedom of Information – 11,

c. Personnel action – 9,

d. Discrimination complaints – 7,

e. Patent and trade secret – 2.

A small but significant portion of these cases involved requests for injunctive relief. As may be seen from the foregoing breakdown almost all of our litigation involves problems common to many Federal agencies. District Court actions involving review of formal administrative records generally relate to personnel actions, discrimination complaints, and EEO contract compliance actions.

3. No actions of this Agency are subject to direct review in a court of appeals.

4. We do not recall any instances of intercircuit conflict in cases involving this Agency.

5. Only in cases seeking injunctive relief relating to the proposed release of information furnished this Agency by contractors under the EEO Contract Compliance Program have we been aware of forum-shopping. The reason appears to be that a particular district court has been more sympathetic to arguments of competitive harm advanced by plaintiff contractors seeking injunctive relief. In these cases the Agency is basically a stake holder as between the contractors and the member of the public seeking the information furnished to the Agency by the contractors. Thus, the forum-shopping has had little impact on the quality or efficiency of this Agency's operations.

6. Most of the patent infringement litigation and much of the litigation relating to trade secrets and technical data involve complex scientific or technical questions. While

the Court of Claims has trial judges with extensive patent and technical backgrounds, judges in the district courts are generally fully able to understand and handle these issues also.

FOR THE DIRECTOR:

/s/ Karl Kabeiseman
KARL KABEISEMAN
Counsel

In The

Supreme Court of the United States

October Term, 1976

No. 76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.
Respondents.

OPPOSITION OF RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND GENERAL MOTORS CORPORATION TO THE MOTION OF THE *AMICUS* ROBERTSON

CHARLES F. VANCE, JR.
GUY F. DRIVER, JR.
FRANCIS C. CLARK
2400 Wachovia Building
P.O. Drawer 84
Winston-Salem, North Carolina 27102

EUGENE L. HARTWIG
General Motors Corporation
General Motors Building
Detroit, Michigan 48202

STUART SALTMAN
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

Attorneys for Respondents,
Westinghouse Electric Corporation
and General Motors Corporation

10679B LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201)257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

In The

Supreme Court of the United States

October Term, 1976

No. 76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
Respondents.

OPPOSITION OF RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND GENERAL MOTORS CORPORATION TO THE MOTION OF THE *AMICUS* ROBERTSON

QUESTION PRESENTED

Whether an alleged Rule 19 party who received notice of a Reverse Freedom of Information Act action well prior to the trial, and who could have asserted his right to intervene without hardship, can raise a Rule 19 question for the first time in the United States Supreme Court.

STATEMENT

On April 10, 1974, respondent General Motors instituted its action in the United States District Court for the Eastern District of Virginia seeking injunctive relief barring petitioners from disclosing documents provided to petitioners by

respondents as government contractors. By letter dated April 19, 1974, the *amicus* was notified of the pendency of respondent General Motors' lawsuit and the existence of a restraining order against petitioner. Some 18 days later, a trial on the merits was conducted between respondent General Motors and petitioner. Even though he received notice *amicus* did not seek to intervene in respondent's Virginia action but rather on April 26, 1974, chose to file a separate FOIA case in the District of Columbia seeking to compel the disclosure of the self-same documents which were barred from disclosure by the restraining order in Virginia. The Virginia trial court's opinion in the *General Motors'* action was filed on September 20, 1974, and the circuit court's opinion was rendered on September 30, 1976.

At no time, either before the trial court or before the circuit court, did the *amicus* raise his Rule 19 indispensable party allegation. The *amicus* now, for the first time, asserts his Rule 19 contention before this Court.

ARGUMENT

Respondents Westinghouse Electric Corporation[1] and General Motors Corporation oppose *amicus* Robertson's motion seeking to raise the applicability of Rule 19 of the Federal Rules of Civil Procedure to reverse FOIA cases. In its supporting brief, what the *amicus* asks the Court to do is to require the parties to brief the applicability of Rule 19 to reverse FOIA cases.[2]

Respondents' first opposition to *amicus'* efforts to raise his

1. *Amicus* does not seek to raise its Rule 19 contention with respect to respondent Westinghouse since the requestor of the documents in issue intervened at the trial of that case. Respondent Westinghouse nonetheless joins respondent General Motors in opposition to the *amicus*. Respondent Westinghouse asserts the contention of the *amicus* regarding Rule 19 is untenable and wants its opposition to *amicus'* Rule 19 theory to be a matter of record.

2. *Amicus'* brief, p. 12.

Rule 19 contention is based on the lack of ripeness of that issue for review and the inadequacy of the current record to permit review of that issue. *Amicus'* Rule 19 contention was not raised below nor has it even been the subject of a motion to dismiss. Hence, respondent urges the Rule 19 question is not "definite and concrete and touching the legal relations of the parties having adverse legal interests."[3] Nor is *amicus'* Rule 19 allegation in such a posture that any adjudication of it can rest "on an adequate and full bodied record" as this Court requires.[4]

In his motion and brief in support, the *amicus* asserts without qualification that he is an indispensable party within the meaning of Rule 19. Respondents do not concede that the *amicus* possesses "substantive rights" to qualify him as a bona fide Rule 19 party.[5] Contrary to *amicus'* argument of indispensability, respondents urge that *amicus* enjoys no greater status than any other citizen who, under the FOIA, has the right to request records of his Government.[6] The only distinction betwen *amicus* and the other millions of United States citizens is that *amicus* has exercised the right to request documents.

Whatever arguable status *amicus* might have enjoyed either under Rule 19 or Rule 20, persuasive supportive authority exists that by virtue of *amicus'* failure to intervene, he relinquished any right to claim prejudice because of his nonjoinder. In *Provident Bank & Trust Co. v. Patterson,*[7] this Court addressed the issue of nonintervention by an indispensable party, but did not pass on that issue. However, the Second Circuit has considered the

3. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937).

4. *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111 (1962).

5. *Provident Bank & Trust v. Patterson,* 390 U.S. 102 (1968).

6. 5 U.S.C. §552 (Supp. V 1975).

7. 390 U.S. 102 (1968).

issue and held that the Government, which was not joined pursuant to Rule 19, could not claim bias because intervention was available to protect its interests.[8] Likewise, another court has stressed that an absentee can often avoid prejudice by intervention and should do so if undue hardship is not imposed by intervention.[9]

Amicus expressly acknowledges that he was notified of the pendency of the present action shortly after the restraining order was entered and well before a trial on the merits was conducted. *Amicus* was located only a few miles across the Potomac River from the court where intervention could have been sought. *Amicus* makes no claim of undue hardship impairing his ability to intervene. *Amicus'* only explanation for not intervening was his dislike for the forum where respondents' litigation was pending and his desire to have his own forum.[10] Respondents assert that under those circumstances, *amicus* should not be heard to complain about the failure to join him as a party at this late date.

Finally, respondents urge that *amicus'* efforts to raise his Rule 19 contention "comes late in the day" in the case. Courts have expressed disfavor toward procedural motions raised at the appellate level. In *Provident,* this Court observed that raising an indispensable party question at the appellate level creates complex problems.[11] In a case decided under former Rule 19, the court held that dismissal was not automatic even though an indispensable party had not been joined. A party who is dilatory in raising a motion may relinquish the right to do so,

8. *Staten Island Rapid Transit Ry. Co. v. S.T.G. Construction Co.,* 421 F.2d 53, 58 n.6 (2d Cir.), *cert. den.,* 398 U.S. 951 (1970).

9. *Smith v. American Fed. of Musicians,* 47 F.R.D. 152 (S.D.N.Y. 1969).

10. *Amicus'* brief, p. 12, n. 5.

11. 390 U.S. at 110.

particularly in light of the direction of Rule 1 of the Federal Rules of Civil Procedure which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[12]

CONCLUSION

WHEREFORE, consistent with the foregoing, respondents urge that *amicus'* motion asking the Court to require the parties to brief the applicability of Rule 19 be denied.

Respectfully submitted,

Charles F. Vance, Jr.
Guy F. Driver, Jr.
Francis C. Clark
2400 Wachovia Building
Post Office Drawer 84
Winston-Salem, North Carolina 27102

Eugene L. Hartwig
General Motors Corporation
General Motors Building
Detroit, Michigan 48202

Stuart Saltman
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

12. *Benger Laboratories, Ltd. v. R.K. Laros Co.,* 24 F.R.D. 450 (E.D. Pa. 1959).